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JUDICIAL OVERKILL IN APPLYING THE RULE IN SHELLEY'S CASE

William A. Reppy, Jr. *

I. INTRODUCTION

The Rule in Shelley's Case holds that when *O* conveys "to *A* for life then to *A*'s heirs," *A* gets a fee simple absolute and his would-be heirs not even a future interest. *O*'s intent that *A* get only a life estate is frustrated. The respected Simes and Smith treatise states that courts sometimes look for "a pretext to cut down the scope of the Rule in Shelley's Case."¹ The thesis of this Article is that—far more frequently—just the opposite is occurring. Perhaps to make a display of their willingness to carry out the judicial duty of enforcing a much-maligned and intent-defeating rule, courts are erroneously holding Shelley's Rule applicable to limitations in remainder that, upon correct analysis, are outside the Rule's scope.

II. THE RULE IN SHELLEY'S CASE: ITS HISTORY, ITS NOW-IRRELEVANT POLICY BASES, AND ITS PRACTICAL APPLICATION

A. *The Rule Dates from the 14th Century and Probably Was Rooted in Judicial Respect for the Incidents of Feudal Tenures*

The Rule in Shelley's Case refers, linguistically, to the 1581 decision in *Wolfe v. Shelley*,² but the concept that what looks like a remain-

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1 LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 1549, at 453 (2d ed. 1956). For such a case, see *Jones v. Stone*, 279 S.E.2d 13 (N.C. Ct. App. 1981), described in *infra* text accompanying note 205.

2 76 Eng. Rep. 206 (K.B. 1581). The facts of the case are also described in various other sources. See, e.g., *Benton v. Baucom*, 135 S.E. 629, 631 (N.C. 1926); Norman Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C. L. REV. 49, 50-51 (1941);

der conveyed to the life tenant's heirs as purchasers³ is actually language of limitation creating a fee in the apparent life tenant has been traced to an English decision, *Abel's Case*, decided in 1324.⁴ Under feudal concepts of this time, if overlord *O* had enfeoffed underlord *A* "and his heirs" in a livery of seisin ceremony so that *A* acquired an estate in tenure, holding of *O*, the "and his heirs"⁵ signified that *O* also consented to have *A*'s heir, upon *A*'s death, succeed as underlord, holding under *O* (or *O*'s heir if *O* had died) in a position of fealty. One of the most costly⁶ incidents of feudal tenure that an underlord owed his immediate overlord was the relief, payable at the former's death, as the cost of the overlord's acceptance of the underlord's heir as the decedent's successor in the tenurial chain. For some reason, the old courts were unwilling to expand the law to make

Annotation, *Note on the Rule in Shelley's Case*, 29 L.R.A. (N.S.) 963, 968-69 (1911) [hereinafter *Note*].

For an interesting peek at the historical, political, social, and religious underpinnings of the case see A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 13-44 (1995).

3 "Purchasers" means persons who take an estate other than by intestate succession; the concept does not involve payment of money or other consideration. See 1 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY* § 24 (Basil Jones ed., 3d ed. 1939). Donees and devisees are purchasers; they take "by purchase," and the language of an instrument describing them constitutes "words of purchase." Heirs taking by intestate succession are not purchasers. See *id.* § 28.

4 Y.B. 18 Edw. II 577 (1324), cited and discussed in *RESTATEMENT OF PROPERTY* § 312 cmt. a (1940); see also *Note*, *supra* note 2, at 977 (discussing *Abel's Case* but dating it as 1325). SIMES & SMITH, *supra* note 1, § 1542, trace the Rule back to 1366 and state that it "probably" had earlier roots.

5 Under the principle of primogeniture, it was expected that *A*'s heir would be his eldest surviving son. Hence the "s" in "heirs" indicated that the overlord was accepting not only *A*'s heir, *A, Jr.*, to assume a position of fealty under him, but also *A III*, as heir of *A, Jr.*, *A IV*—for an unlimited number of future successions. See SIMES & SMITH, *supra* note 1, § 1543.

6 See *Society Nat'l Bank v. Jacobson*, 560 N.E.2d 217, 221 (Ohio 1990); SIMES & SMITH, *supra* note 1, § 1543 (describing relief as well as some other feudal incidents); John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681, 682 (1989); James A. Webster, Jr., *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C. L. REV. 3, 18 (1966); *Note*, *supra* note 2, at 980.

There were incidents of feudal tenure in addition to the relief that was imposed on underlords who took by intestate succession, and some authorities state that the reason for Shelley's Rule was to eliminate a device to avoid, not the relief in particular, but all such incidents. See *Wool v. Fleetwood*, 48 S.E. 785, 789 (N.C. 1904); *King v. Beck*, 15 Ohio 559, 563 (1846); *RESTATEMENT OF PROPERTY* § 312 cmt. a (1940); 1 *AMERICAN LAW OF PROPERTY* § 4.40, at 478-79 (A. James Casner ed., 1952) [hereinafter *AMERICAN LAW*] (mentioning the incidents of wardship, marriage, and primer seisin, which did not attach when underlord took by purchase); Addison M. Dowling, *Rationale of the Rule in Shelley's Case in Indiana*, 13 IND. L.J. 466, 470-71 (1938).

the relief payable when A, Jr. took his father's place in the tenurial change by grant, either directly to him by name or as the heir in an apparent limitation in remainder to the heirs of A. Instead the grant to A, Jr. by name was held a fraud on the overlord,⁷ forcing A, Jr. to take by succession; and what is now called Shelley's Rule treated "and his heirs" as language of limitation, giving A a fee and also forcing A, Jr. to take by succession and to pay a relief. The relief was abolished in 1660,⁸ but Shelley's Rule remained part of the common law in England until 1925.⁹

Another theory states that old English courts developed Shelley's Rule out of fairness to creditors of the life tenant.¹⁰ The notion is that if Lord A enfeoffed a straw person who in turn promptly enfeoffed A for life, remainder to A's heirs, nothing really happened if this were given literal effect except to limit A's creditors to the seizing of an estate measured by his life. This was so because (1) A could not devise the land (until the Statute of Wills was enacted in 1540), and (2) as a practical matter, A was not going to convey the land outside the family. Absent an attempt by A to convey *intervivos* the estate to A, Jr. or to A, Jr. for life with remainder to his heirs, A was going to let it pass by succession to A, Jr. his eldest son.¹¹

7 See RESTATEMENT OF PROPERTY § 314 cmt. j. (1940) (explaining that a devise to named person who turned out to be heir of conveyor was ineffective as a device to avoid feudal incidents); see also George B. Young, *The Rule in Shelley's Case in Illinois: A New Analysis and Suggestions for Repeal*, 45 ILL. L. REV. (NORTHWESTERN) 173 (1950).

8 See Orth, *supra* note 6, at 683.

9 Law of Property Act, 1925, 15 Geo. 5, ch. 20, § 131, at 661 (Eng.).

10 Doyle v. Andis, 102 N.W. 177 (Iowa 1905); Benton v. Baucom, 135 S.E. 629, 630 (N.C. 1926); Williams v. Houston, 57 N.C. (4 Jones Eq.) 268, 270 (1858) (finding that the Rule's purpose was to prevent "manifest fraud of the rights of third persons"); see also Myers v. Myers, 190 N.W. 491, 492 (Neb. 1922) (stating that the purpose was to avoid restraint on alienation placed on a person who was effectively sole owner).

Abel's Case of 1324, said by the RESTATEMENT OF PROPERTY § 312 cmt. A (1940), to be the fountainhead of Shelley's Rule, treated the originally intended life tenant grantee as a fee owner in order to benefit one of his creditors.

11 See RESTATEMENT OF PROPERTY § 312 cmt. a (1940) (explaining that alienations by feoffee holding a fee were very rare in 1300s).

Yet another theory for development of what is now called the Rule in Shelley's Case is that it dates from a time—the 1300s—when contingent remainders were not recognized. To give some effect to the words "then to his heirs," the courts changed them to "and to his heirs," while striking "for his life" as inconsistent with the fee estate created by "and heirs." See SIMES & SMITH, *supra* note 1, § 1534; W.A. Rhea, *The Rule in Shelley's Case in Texas*, 3 TEX. L. REV. 109, 122 (1925).

Finally it has been suggested that because, under primogeniture, the life tenant himself would have but one heir, the conveyor's language envisioning the land passing to "heirs" (plural) meant generation after generation, so that "and then to his heirs" were words of limitation, not purchase. See Dowling, *supra* note 6, at 471.

The sole attempt to defend Shelley's Rule on the basis of a modern policy asserts that it makes land more alienable.¹² That is, because of the Rule, the would-be life tenant, whose heirs are unknown until he dies, can convey a fee simple.

B. *Shelley's Rule Is Intent-Defeating*

One court has opined that Shelley's is "a rule which has done more to produce litigation, and, when sustained, thwart the actual purposes of a testator than all the other arbitrary rules combined."¹³ As a rule of law, rather than of construction,¹⁴ the Rule applies "inexorably"¹⁵ in the face of the strongest statement of intent that the life tenant's heirs shall take as purchasers.¹⁶ It applies even though the

12 See, e.g., *Jones v. Stone*, 279 S.E.2d 13 (N.C. Ct. App. 1981), described in *infra* text accompanying note 197; *Note, supra* note 2, at 987-88, 991.

13 *Gross v. Sheeler*, 31 A. 812, 812 (Del. 1885).

14 See 1 AMERICAN LAW, *supra* note 6, at 480.

15 *Lippincott v. Davis*, 28 A. 587, 588 (N.J. 1894) (holding that even "the most positive or unequivocal" statement of contrary intent is irrelevant).

16 In each of the following cases the conveyor tried mightily but without success to employ stated intent to defeat Shelley's Rule. *Bishop v. Williams*, 255 S.W.2d 171, 171-72 (Ark. 1953) (involving instrument which stated that "the term heirs herein used is a term of purchase and not of limitation"); *Wilson v. Harrold*, 123 N.E. 563, 564 (Ill. 1919) (involving conveyance which specified, "it being expressly understood that but a life estate is hereby deeded [and the grantee] is to hold it absolutely in trust for his lawful heirs" to whom title does not pass until the life tenant's death); *Andrews v. Spurlin*, 35 Ind. 262, 264 (1871) (involving deed to Mary which stated that she quitclaimed to grantor any interest but a life estate and that any other "transfer of the said real estate by said Mary Wood shall in no wise be valid"); *Kirby v. Broadus*, 145 P. 875, 875 (Kan. 1915) (involving instrument which indicated that life tenants shall have "life estates only," and "the fee to the premises herein described shall vest absolutely" in their heirs); *Lauer v. Hoffman*, 88 A. 496, 497 (Pa. 1913) (involving instrument which stated that "in no event whatever shall the fee simple . . . vest" in the life tenant); *Finley v. Finley*, 318 S.W.2d 478, 480 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.) ("This will, however, shall not be construed to give [life tenant] Norman L. Finley a fee simple title."); see also *Cook v. Sober*, 135 N.E. 60, 61 (Ill. 1922) (dictum) (stating that Shelley's Rule would apply if instrument said "and they shall take as purchasers"); *Lippincott v. Davis*, 28 A. 587 (N.J. 1894) (dictum) (stating that Shelley's Rule would apply if instrument said heirs were to take by purchase).

Some older Texas decisions have treated Shelley's Rule as one of construction, apparently requiring—to avoid the Rule's application—some expression of anti-Shelley intent beyond the words "for life" in the initial conveyance clause. See *Robinson v. Glenn*, 238 S.W.2d 169, 170 (Tex. 1951) ("The courts of Texas look with disfavor on the application of the Rule in Shelley's Case."); *Wallace v. First Nat'l Bank*, 35 S.W.2d 1036 (Tex. 1931). More recent Texas cases hold the Rule must be applied despite clear intent that the conveyor intended the heirs to take as purchasers. See *Sybert v. Sybert*, 254 S.W.2d 999 (Tex. 1953); *Finley v. Finley*, 318 S.W.2d 478 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.).

instrument refers to the Rule by name, demanding that it not be applied.¹⁷ Since it nullifies the expressed intent that the named grantee or devisee take a life estate, many authorities state that it is inherently intent-defeating.¹⁸

There are two reported cases where the court applied Shelley's Rule while stating that the conveyer in fact intended it to apply. In one, the court may have been correct. In a 1906 Maryland case,¹⁹ a grantor deeded land to a husband and wife for their "joint lives" and to the survivor "for life," and "then to their joint heirs."²⁰ The deed also contained a specific covenant of further assurances to "secur[e] unto them [the husband and wife] a good and sufficient right and title to the above-described premises in fee simple."²¹ This covenant, held the Maryland Court of Appeals, showed the grantor's intention that the term "joint heirs" be used as words of limitation and not of purchase. That may be true; but the notion of a conveyer deliberately relying on Shelley's Rule to upgrade a specified life estate to a fee is almost incredible.

In the other case, an 1884 West Virginia decision,²² the court's insistence that the conveyer intended Shelley's Rule to apply is foolish. The case involved a devise of land to the testator's son "during his natural life, and at his death, then to *descend* to his legal heirs."²³ Since testator wanted the heirs to take by descent, said the court, he "necessarily" also intended the named ancestor to take the fee. "The language could not possibly have been contemplating"²⁴ heirs taking as individuals rather than as the first of a potentially indefinite series of intestate successions. The son would have a fee even if the will had become effective after the state abolished the Rule in Shelley's Case.

17 *Fowler v. Black*, 26 N.E. 596, 597 (Ill. 1891) (dictum); *Polk v. Faris*, 17 Tenn. (9 Yer.) 209, 237 (1836) (dictum); RESTATEMENT OF PROPERTY § 312 cmt. k (1940); 1 AMERICAN LAW, *supra* note 6, § 4.47, at 490.

18 *McClen v. Lecker*, 123 N.E. 475, 477 (Ind. App. 1919); *Fraser v. Chene*, 2 Mich. 81, 91 (1851); *Cotten v. Moseley*, 74 S.E. 454, 457 (N.C. 1912); *SIMES & SMITH*, *supra* note 1, § 1544; *Rhea*, *supra* note 11, at 129; *Webster*, *supra* note 6, at 3; *see also* *Vangieson v. Henderson*, 36 N.E. 974, 974 (Ill. 1894) (stating that the Rule is "often" intent defeating); *James W. Simonton, The Rule in Shelley's Case in West Virginia*, 26 W. VA. L.Q. 178, 179 (1920) (stating that the Rule is "almost invariably" intent-defeating).

19 *Waller v. Pollitt*, 64 A. 1040 (Md. 1906).

20 *Id.* at 1041.

21 *Id.*

22 *Chippis v. Hall*, 23 W. Va. 504 (1884).

23 *Id.* at 508 (emphasis added).

24 *Id.* at 521.

Surely, however, the testator meant "descend" in a nontechnical, broad sense of "go to."²⁵

That Shelley's Rule is, almost always intent-defeating is an important point underlying the thesis of this Article: that courts have been so concerned with doing nothing to escape from the *Shelley*-imposed obligation to defeat the conveyor's stated intent that they have extended Shelley's Rule beyond its scope in many ways.

C. Because It Is Intent-Defeating, Shelley's Rule Has Been Abolished in Many States But Remains a Significant Element of American Conveyancing Law

Shelley's Rule was never adopted in a small number of states²⁶ and has been abrogated, usually by statute, in all but three of the other American jurisdictions: Arkansas, Delaware, and Indiana.²⁷ In Indiana, a statute abolishes the Rule for purposes of determining the scope of a beneficial interest in a trust.²⁸ However, the statutory abrogations of Shelley's Rule are prospective only, so as not to disturb titles acquired in reliance on the common law.²⁹ Some of the statutes are

25 Several cases have involved the applicability of Shelley's Rule to an instrument stating that the remainder will "descend" to the life tenant's heirs. No court other than the West Virginia Supreme Court of Appeals has suggested that there is such magic in that word that the person specified as life tenant should take a fee even without the intent-defeating Shelley's Rule. See *McQueen v. Logan*, 80 Ala. 304 (1885); *Lydick v. Tate*, 44 N.E.2d 583 (Ill. 1942); *Baker v. Scott*, 62 Ill. 86 (1871); *Taney v. Fahnley*, 25 N.E. 882 (Ind. 1890); *Lippincott v. Davis*, 28 A. 587 (N.J. 1896); *Crisp v. Briggs*, 96 S.E. 662 (N.C. 1918); *Hodges v. Fleetwood*, 9 S.E. 640 (N.C. 1889); *Allen v. Markle*, 36 Pa. 117 (1859).

26 *Thurston v. Allen*, 8 Haw. 392 (1892); *Smith v. Hastings*, 29 Vt. 240 (1857); RESTATEMENT OF PROPERTY § 313 cmt. a, special note (1940) (referring to Hawaii and Vermont); RESTATEMENT (SECOND) OF PROPERTY § 30.1 cmt. 1 (adding that Shelley's Rule's root in Colorado is dictum in a 1988 case). SITES & SMITH, *supra* note 1, § 1563, state that while Vermont and Hawaii affirmatively rejected *Shelley*, in Utah, there is no case law at all on point. This is still true according to a 1996 Westlaw search for "Shelley's Case" in Utah cases.

27 See *Smith v. Wright*, 779 S.W.2d 177 (Ark. 1989); *Estate of Donovan*, No. CIV.A.756, 1983 WL 103280 (Del. Ch. Apr. 14, 1983); *Society Nat'l Bank v. Jacobson*, 560 N.E.2d 217, 220 n.3 (Ohio 1990); *Orth*, *supra* note 6, at 681 n.3; see also *Drayer v. Wright*, 782 S.W. 2d 572 (Ark. 1990) (finding Shelley's Rule inapplicable); *In re Trusteeship of Creech*, 159 N.E.2d 291 (Ind. Ct. App. 1959) (same).

28 IND. CODE ANN. § 30.4-7-2-7(b) (Michie 1993).

29 See *McQueen v. Logan*, 80 Ala. 304 (1885); SITES & SMITH, *supra* note 1, § 1563. Of the abolition statutes cited in *infra* note 33, a specific prospective-only proviso is contained in those of Oregon, Texas, and Illinois. See OR. REV. STAT. § 112.345 (Butterworth 1990); TEX. PROB. CODE ANN. § 5.042 (West 1984); 765 ILL. COMP. STAT. ANN. 345/1 (West 1993).

relatively recent. Washington's statute abrogating the application of Shelley's Rule to deeds was enacted in 1994.³⁰ North Carolina's statute³¹ generally abolishing Shelley's Rule applies only to "transfers that take effect" on or after October 1, 1987.³² In eight other states, the statutory abolition is less than fifty-five years old.³³ In these jurisdictions, as well as others with even older abolition statutes, Shelley's Rule is by no means a dead letter. It is rather common to find parties litigating the effect of Shelley's Rule on an instrument more than forty,³⁴ fifty,³⁵ or even sixty to eighty³⁶ years after the effective date of

30 WASH. REV. CODE ANN. § 11.12.180 (West. Supp. 1996) (enacted by 1994 Wash. Laws 221, § 17). It was not entirely clear that Shelley's Rule would apply to deeds in Washington before the enactment of this statute. See *Rubenser v. Felice*, 365 P.2d 320 (Wash. 1961); Harry M. Cross, Comment, *The Rule in Shelley's Case in Washington*, 15 WASH. L. REV. 99 (1940).

31 N.C. GEN. STAT. § 41-6.3 (1995).

32 1987 N.C. Sess. Laws 706, § 2.

33 ALASKA STAT. § 34.27.020 (Michie 1990) (enacted by 1983 Alaska Sess. Laws 51, § 2); FLA. STAT. ANN. § 689.17 (West 1994) (enacted by 1945 Fla. Laws ch. 23126, § 2); 765 ILL. COMP. STAT. ANN. 345/1 (West 1993) (enacted by 1953 Ill. Laws § 1); KY. REV. STAT. ANN. § 381.090 (Banks-Baldwin 1989) (enacted by 1942 Ky. Acts 208, § 1; ME. REV. STAT. ANN. tit. 33, § 158 (West 1988) (enacted by 1954 Me. Laws 168, § 12) (applicable only to realty); NEV. REV. STAT. ANN. § 111.101 (Michie 1993) (enacted by 1983 Nev. Stat. ch. 388, § 2) (specifically applicable only to realty); OR. REV. STAT. § 112.345 (Butterworth 1990) (enacted by 1969 Or. Laws ch. 591, § 48); TEX. PROB. CODE ANN. § 5.042 (West 1984) (enacted by 1963 Tex. Gen. Laws 199).

34 *Tucker v. Adams*, 14 Ga. 548 (1854) (48 years); *Hege v. Provident Mut. Life Ins. Co.*, 173 N.E. 610 (Ill. 1930) (44 years); *Webbe v. Webbe*, 84 N.E. 1054 (Ill. 1908) (41 years); *Taney v. Fahnley*, 25 N.E. 882 (Ind. 1890) (43 years); *Hall v. Gradwohl*, 77 A. 480 (Md. 1910) (42 years); *Waller v. Pollitt*, 64 A. 1040 (Md. 1906) (44 years); *Patrick v. Morehead*, 85 N.C. 62, (1881) (46 years); *Bassett v. Hawk*, 11 A. 802 (Pa. 1888) (45 years); *Clark v. Neves*, 57 S.E. 614 (S.C. 1906) (48 years); *Moore v. Brooks*, 53 Va. (12 Gratt.) 135 (1855) (45 years).

The years are measured from the effective date of the instrument (date of death of testator when given, otherwise date of probating the will) until the date of the reported decision concerning applicability of Shelley's Rule.

35 *Aetna Life Ins. Co. v. Hoppin*, 214 F. 928 (7th Cir. 1914) (Illinois law—52 years); *American Security & Trust Co. v. Cramer*, 175 F. Supp. 367 (D.D.C. 1959) (59 years; decided 57 years after enactment of statute abolishing Shelley's Rule); *Smith v. Wright*, 779 S.W.2d 177 (Ark. 1989) (56 years); *Fuller v. Fuller*, 40 Cal. Rptr. 393 (Cal. Ct. App. 1964) (59 years); *Handy v. McKim*, 4 A. 125 (Md. 1886) (50 years); *Crockett v. Robinson*, 46 N.H. 454 (1866) (51 years—two instruments considered); *Mazzola v. Malley*, 68 A.2d 655 (N.J. Super. Ct. Ch. Div. 1949) (55 years); *Quick v. Quick's Ex'r*, 21 N. J. Eq. 13 (1870) (54 years); *Lytle v. Beveridge*, 58 N.Y. 592 (1874) (51 years); *Chappell v. Chappell*, 133 S.E.2d 666 (N.C. 1963) (53 years); *White v. Lackey*, 253 S.E.2d 13 (N.C. Ct. App. 1979) (57 years); *Society Nat'l Bank v. Jacobson*, 560 N.E.2d 217 (Ohio 1990) (59 years); *Polk v. Faris*, 17 Tenn. (9 Yer.) 209 (1836) (50 years); *Stokes v. Van Wyck*, 3 S.E. 387 (Va. 1887) (53 years); *Taylor v. Cleary*, 70 Va. (29 Gratt.) 448 (1877) (56 years); *Pryor v. Duncan*, 47 Va. (6 Gratt.) 27 (1849) (52 years).

the instrument. This is often the result of the would-be life tenant's longevity, with no one in the family caring to litigate what happens at his or her death until it occurs.³⁷

D. Shelley's Rule Has Generated an Enormous Amount of Litigation

Probably because it is intent-defeating, Shelley's Rule has resulted in a mass of litigation.³⁸ Researching this Article, I got the impression that instruments presenting Shelley's Rule issues lead to reported decisions (almost all appellate) at a higher percentage rate than that generated by any other legal issue in civil or criminal law. The majority of the suits seem to be pursued by would-be remainderpersons who, under the Rule, have the future interest intended for them stripped away. However, apparent life tenants seeking to quiet title are also responsible for a fair share of the cases leading to reported decisions. Grantees of the intended life tenant seem to constitute the next largest category of Shelley's Rule plaintiffs.

Most of the Shelley's Rule litigation concerns the issue that is the primary focus of this Article: whether the word "heirs" in the remainder clause was used in its technical sense. Probably the second largest batch of Shelley's Rule cases concerns whether a word other than "heirs" such as "issue" should be treated as its equivalent.

Other potential issues under Shelley's Rule seem to be less frequently litigated. They include: (1) whether the life estate and remainder are both legal or both equitable, as is required for Shelley's Rule to apply;³⁹ (2) whether an intervening interest in a party other than the life tenant precludes application of the Rule (it does not);⁴⁰

36 *Holt v. Pickett*, 20 So. 432 (Ala. 1896) (71 years); *Hartwick v. Heberling*, 4 N.E.2d 965 (Ill. 1936) (62 years); *People v. Emery*, 145 N.E. 349 (Ill. 1924) (75 years); *Lamb v. Medsker*, 74 N.E. 1012 (Ind. App. 1905) (67 years); *Hough v. Farmers Bank & Trust Co.*, 60 A.2d 11 (Pa. 1948) (71 years); *Campbell v. Lewisburg & N. R.R.*, 26 S.W.2d 141 (Tenn. 1930) (64 years); *Turner v. Montiero*, 103 S.E. 572 (Va. 1920) (71 years); *Curtis v. Price*, 33 Eng. Rep. 35 (Ch. 1805) (80 years).

37 See, e.g., *People v. Emery*, 145 N.E. 349 (Ill. 1924). This case involved a situation where the testator died in 1849, and the life tenant survived until 1923. Only then did her brother sue for a determination whether the decedent had a life estate or fee simple under Shelley's Rule.

38 See Note, *supra* note 2, at 653 and *passim* (reviewing many of the hundreds of reported decisions existing as of 1911).

39 E.g., 1 AMERICAN LAW, *supra* note 6, § 4.41, at 482.

40 See Note, *supra* note 2, at 997. Example: *O* to *A* for life, then to *B* for life, then to *A*'s heirs. The intervening life estate merely delays application of *Shelley*. *B* can have the courts treat *A* as a life tenant subject to the laws of waste, but *A*'s future heirs have no interest. *A* can convey a fee simple estate subject to *B*'s life estate (and to the law of waste so long as *A* is alive in the lifetime of *B*).

and (3) whether Shelley's Rule applies to personal property—the initial illustration in this Article of an improper extension of the Rule.

III. SHELLEY'S RULE HAS BEEN UNNECESSARILY EXTENDED TO PERSONAL PROPERTY IN SEVERAL STATES

Historically, the law did not require that the words "and his heirs" follow the name of the transferee to pass to him full, inheritable ownership in personal property—the equivalent to the fee simple estate in land.⁴¹ Ownership of personal property at the time Shelley's Rule emerged in England involved no feudal incidents that could be avoided if personal property passed by inter vivos conveyance rather than succession. Accordingly, most American authorities state that Shelley's Rule does not apply to testamentary gifts or inter vivos transfers of personalty.⁴²

In perhaps a dozen states, however, Shelley's Rule has been applied to personalty.⁴³ Some courts, recognizing that this makes little legal sense, say the rule that the heirs take no interest in the personalty and the life tenant gets full ownership is actually an "analogy" to Shelley's Rule.⁴⁴ The most recent case to apply Shelley's Rule, from Ohio in 1990,⁴⁵ involved the question whether Shelley's Rule should apply to personalty. The court held, in effect, that it could see no reason for having a different rule for interpreting "then to his heirs" when land was at issue, as opposed to personal property. Of course

When the intervening interest is a prior *remainder*, however, Shelley's Rule will not apply if conditions for it to become possessory at the end of the life estate are met. Example: *O to A for life, then to A's children, but if he has no children, to his heirs*. If a child is born to A, the first of the alternative remainders becomes vested and Shelley's Rule will never apply to create a fee. See, e.g., *Ridgeway v. Lamphear*, 99 Ind. 251 (1884). If A dies childless, he can, due to Shelley's Rule, devise a fee simple absolute to defeat his heirs.

41 SIMES & SMITH, *supra* note 1, § 498.

42 See RESTATEMENT (SECOND) OF PROPERTY § 30.1(3) (1988); 1 AMERICAN LAW, *supra* note 6, § 4.41, at 482 (citing *In re Thorne's Estate*, 25 A.2d 811 (Pa. 1942)).

43 See, e.g., *Crandall v. Barker*, 78 N.W. 347 (N.D. 1898) (discussing note secured by mortgage on North Dakota land—Pennsylvania law concerning Shelley's Rule applied); *Riegel v. Lyerly*, 143 S.E.2d 65 (N.C. 1965); C.C. Marvel, Annotation, *Modern Status of the Rule in Shelley's Case*, 99 A.L.R.2d 1161, 1172 (1965) (reporting that Shelley's Rule is applied to personalty in Florida, Massachusetts, and Rhode Island). For cases applying Shelley's Rule to pre-emancipation transfers of slaves, see *infra* note 47.

44 E.g., *Knox v. Barker*, 78 N.W. 352 (N.D. 1898); see also Homer F. Carey, *Words of Limitation or Words of Purchase: Rule in Shelley's Case—Wild's Case—Miscellaneous*, 34 ILL. L. REV. (NORTHWESTERN) 379 (1939).

45 *Society Nat'l Bank v. Jacobson*, 560 N.E.2d 217 (Ohio 1990).

there is a very good reason: the conveyor's intent should be given effect unless settled law requires it to be defeated.

Only in the case of "mixed" conveyances is there reason to extend Shelley's Rule to personalty. Example: *O* devises Blackacre together with all farm equipment, furniture, and domestic animals located thereon at *O*'s death to *A* for life and then to *A*'s heirs. Policies of the "institutional theory" of trade fixtures law⁴⁶ can support an application of Shelley's Rule that causes *A* to receive full ownership to a working farm, horse and plough included, and not just to the land.⁴⁷ However, no reason exists for applying Shelley's Rule to a bequest of money or transfer of corporate stock or bonds.

IV. CANONS OF CONSTRUCTION APPLICABLE TO INSTRUMENTS RAISING SHELLEY'S CASE ISSUES

A. *The Words of the Instrument Are Interpreted as if There Were No Rule in Shelley's Case*

The remaining situations discussed in this Article in which courts have unnecessarily applied Shelley's Rule were based on a construction of the deed or will at issue. Thus, before examining these cases, study should be made of the appropriate rules and maxims of construction of an instrument alleged by a party to be subject to Shelley's Rule. Most courts agree that the starting point in a determination as to whether the Rule in Shelley's Case applies is to construe each word or phrase in the will or deed "precisely as if this rule had no exist-

46 Under the institutional theory, he who contracts to sell land where a commercial enterprise is operating is deemed to be agreeing to transfer trade fixtures with the land, even though had a tenant installed such fixtures, the tenant would have been entitled to remove them at the termination of his or her lease. The notion here is a presumption that the grantor intends to transfer not just the land, but the institution that attracted the buyer to it. See generally *Temple Co. v. Penn Mut. Life Ins. Co.*, 54 A. 295 (N.J. 1903) (holding that seats, lighting, and other chattels on property were necessary and adapted to building functioning as a theater and were part of the realty); 2 *TIFFANY*, *supra* note 3, § 610. The doctrine also applies to a mortgage by instrument describing only the land.

47 States with old decisions applying Shelley's Rule to transfers of slaves have a basis for distinguishing them, for example, from bequests of money or corporate stock. That is, the jurisdictions wanted the transferee to have the same estate in slaves who worked the land as in the land itself when a transferor included both in his conveyance. Cases applying Shelley's Rule to slaves include: *Lloyd v. Rambo*, 35 Ala. 709 (1860); *Machen v. Machen*, 15 Ala. 373 (1849); *Denson v. Thompson*, 19 Ark. 66 (1857); *Childers v. Childers*, 21 Ga. 377 (1857); *Tucker v. Adams*, 14 Ga. 548 (1854); *Ham v. Ham*, 21 N.C. 598 (1837); *Nichols v. Cartwright*, 6 N.C. 137 (1812); *Dott v. Cunningham*, 1 S.C.L. (1 Bay) 453 (1795); *Polk v. Faris*, 17 Tenn. (9 Yer.) 209 (1836); *Hancock v. Butler*, 21 Tex. 804 (1858); *Pryor v. Duncan*, 47 Va. (6 Gratt.) 27 (1849).

ence.”⁴⁸ This means, as the South Carolina Supreme Court stated, that words and phrases in the instrument are interpreted “according to the ordinary rules of construction.”⁴⁹

This Article explores many cases where it appears that the court must have had Shelley’s Rule in mind while construing the instrument at issue. The three most egregious examples of this are described below.

In a Maryland case, *Cook v. Councilman*,⁵⁰ the remainder was to the life tenant’s children and issue of deceased children per stirpes, but if the life tenant died without issue, to the persons who would be his intestate heirs. There were surviving issue of the life tenant who claimed a remainder. The court, however, held that the first reference to “children” really was just to the first generation of lineal heirs, who would take to the exclusion of collaterals. The first use of “issue” meant the second and further generations of lineal heirs. As a result, all of the extensive language—merely summarized above—following the devise of the life estate was collapsed into a remainder “to his heirs.” A more strained attempt to force an instrument into the ambit of the Rule in Shelley’s Case is hard to imagine.

In a Pennsylvania case,⁵¹ the life tenant was the testator’s daughter, and the remainder was to “her children, share and share alike, or heirs at law.” As against the daughter’s grantee of an alleged fee simple, a child of the daughter claimed title as remainderperson after the life tenant’s death. Surely under ordinary rules of construction, the testator intended that children of the life tenant were to take per capita in remainder and that the life tenant’s heirs were a class of secon-

48 *Grimes v. Shirk*, 32 A. 113, 116 (Pa. 1895); *accord* *Lydick v. Tate*, 44 N.E.2d 583, 588 (Ill. 1942) (“[C]onstruction [of the will] cannot be determined from any consideration of the Rule in Shelley’s Case. In determining the intention of the testator, the Rule in Shelley’s Case must be wholly disregarded. That rule cannot properly influence the construction of the will or be given consideration in determining the intention of the testator.”) (citation omitted); *List v. Rodney*, 83 Pa. 483, 491 (1877) (stating that Shelley’s Rule plays no role in determining meaning of words in will); *see also* *Miller v. Mowers*, 81 N.E. 420, 423 (Ill. 1907).

49 *Clark v. Neves*, 57 S.E. 614, 615 (S.C. 1907); *accord* *Estate of Donovan*, No. CIV.A. 756, 1983 WL 103280, at *1 (Del. Ch. Apr. 14, 1983) (construing terms of will using “the normal rules of construction” before applying Shelley’s Rule); *Lydick v. Tate*, 44 N.E.2d 583, 588 (Ill. 1942) (applying “ordinary rules of construction”); *Yarnall’s Appeal*, 70 Pa. 335, 340 (1872); *Duckett v. Butler*, 45 S.E. 137, 138 (S.C. 1903) (interpreting deed “under the ordinary rules of construction”); *see also* *Louis Moreira*, Comment, *The Rule in Shelley’s Case in Texas*, 3 BAYLOR L. REV. 42, 44–54 (1950) (reviewing many of the “basic” rules of construction that can become pertinent in cases where Shelley’s Rule is asserted).

50 72 A. 404 (Md. 1909).

51 *Hough v. Farmers Bank & Trust Co.*, 60 A.2d 11 (Pa. 1948).

dary takers to be substituted in only if there was no child of the life tenant. The word "or" is classically associated with the introduction of a substitutional gift.⁵² But the Pennsylvania court construed "her children" right out of the testator's will: "Manifestly, he used the word 'children' as synonymous with the words 'heirs at law.'" ⁵³ That is, the "or" was converted into an "i.e." Could this have been done for any other reason than to make Shelley's Rule applicable?

In the third example of a court making an unnatural construction so that Shelley's Rule could apply, the remainder was to the male life tenant's "male heirs, equally . . . ; and for want of heirs male, then to go in equal shares to his daughters."⁵⁴ The Rule in Shelley's Case applies when the remainder is in fee tail as well as in fee simple.⁵⁵ Hoping he had a fee tail male due to Shelley's Rule, the person named as life tenant purported to disentail under the Rhode Island procedure for doing so. In order to validate the attempt to disentail, the court, in an 1859 opinion, construed "heirs" as "heirs of the body,"⁵⁶ words which would enable Shelley's Rule to create a fee tail. Whatever the preference for fee tail may have been in England 500 years earlier, by the mid-nineteenth century, the word "heirs" certainly was used in this country to include collaterals under "ordinary rules of construction."⁵⁷

The requirement that Shelley's Rule be ignored in construing the terms of the instrument would seem to render inapplicable statutes found in most states declaring that a limitation in a deed⁵⁸ or will⁵⁹ is presumed to grant an estate in fee. Thus, in the case of a grant "to A for life, then to A's nearest heirs," the presumed-fee statute should not generate a further presumption that the word "nearest" is surplusage in order to vest a fee simple estate in A by force of Shelley's Rule. Such a theory would be taking into account the Rule in Shelley's Case in deciding the meaning of the word "nearest."⁶⁰

52 See RESTATEMENT OF PROPERTY § 252 cmt. a (1940).

53 *Hough*, 60 A.2d at 14.

54 *Cooper v. Cooper*, 6 R.I. 261 (1859).

55 SIMES & SMITH, *supra* note 1, § 1547.

56 *Accord Fraser v. Chene*, 2 Mich. 81 (1851) (not involving a gift over).

57 See *infra* note 91.

58 See, e.g., OKLA. STAT. tit. 16, § 29 (1951) ("Every estate in land which shall be granted, conveyed or devised by deed or will shall be deemed an estate in fee simple and of inheritance, unless limited by express words.").

59 See N.C. GEN. STAT. § 31-38 (1984); see also MO. ANN. STAT. § 474.480 (West 1992).

60 In not one of the scores of cases I read in researching this Article where the Rule in Shelley's Case was applied, did a court rely even in part on a statute of the

B. Courts Have Misapplied the Presumption that a Legal Term of Art Is Used in an Instrument in its Technical Sense

As originally developed in England, the Rule in Shelley's Case could pertain to a deed only if the clause purporting to create a remainder referred to the life tenant's "heirs," "bodily heirs," or "heirs of his [or her] body."⁶¹ These are legal terms of art to which applies the maxim of construction that presumes the conveyer intended the term to carry its technical, legal meaning. That is, "heirs" includes ascendants and collaterals of the life tenant who might be his or her intestate taker on death. "Bodily heirs" can include issue in all generations of descendants of the named ancestor who can take by representation. Most courts applying the presumption in the context of Shelley's Rule state that a party seeking to overcome it must demonstrate "clearly" that the conveyer intended a nontechnical meaning⁶²—for example, that "heirs" really meant issue, or "bodily heirs" meant children.

The most frequently encountered type of limitation that tests the strength of the presumption is this: to A for life, then to A's heirs, but if she die without heirs, then to her surviving brothers and sisters. The great majority of such cases⁶³ holds that it is sufficiently clear in this type of clause that "heirs" is not used in the technical sense, because if A dies with brothers and sisters surviving her, she cannot have died without heirs (in the technical sense). These cases hold that in this type of limitation "heirs" means either "children"—in which case Shelley's Rule has no application—or "issue." If the latter interpretation is employed, most states considered it the equivalent of "heirs of the body" so that the Rule in Shelley's Case does apply and creates a common law fee tail in the person named as life tenant.⁶⁴

When it is urged that the word "heirs" by itself means "issue" or "children," courts correctly apply the presumption that the word is

jurisdiction stating the presumption that an estate in fee is being granted or devised by an instrument under consideration by the court.

61 See RESTATEMENT OF PROPERTY § 312 cmt. f (1940). Although some states have applied Shelley's Rule where the remainder is to "persons who would take by intestacy" upon the life tenant's death, see *infra* text accompanying notes 273–75, 277–80, my research suggests that in more than 95% of the cases in which a court is asked to apply the Rule in Shelley's Case, the word "heirs" appears in the portion of the limitation purporting on its face to create a remainder.

62 See *infra* notes 330–32 and accompanying text.

63 See *infra* notes 304–316 and accompanying text.

64 See *supra* note 55 and accompanying text.

intended by the conveyor to have its technical meaning.⁶⁵ The presumption has, however, been misapplied in many cases where the question before the court was not the meaning of "heirs," but the effect of an adjective or phrase that appeared to qualify the word "heirs." Thus, in a North Carolina case where the remainder was to the life tenant's "lawful heirs," the court held that the qualifying word did not "clearly indicate" that the conveyor used the word "heirs" in a nontechnical sense.⁶⁶ In fact, in this type of case, the party seeking to avoid application of the Rule in Shelley's Case concedes that "heirs" is used in its technical sense to include anyone who might be able to take by intestacy on the life tenant's death. The theory for avoiding Shelley's Rule is that the qualifying word "lawful" then removes from the class of technical heirs illegitimate children and grandchildren

65 The source of the American rule giving such strength to the presumption that "heirs" is used in its technical sense and additional language "must clearly" demonstrate a contrary usage seems to be *Jesson v. Wright*, 4 Eng. Rep. 230 (H.L. 1820), England's most famous (or infamous) Shelley's Rule case since *Wolfe v. Shelley* itself. The will left a life estate to testator's illegitimate nephew William, remainder as William might appoint among "the heirs of his body," and in default of appointment "to the heirs of the body of the said William . . . lawfully issuing, share and share alike as tenants in common . . . [and] if but one child, then to such only child." *Id.* at 248-49. The lower court accepted the argument that "heirs of the body" meant children because (a) no appointment could be made to all of the members of the technical class "heirs of the body," which would include descendants to be born generations in the future, yet the testator intended William to be able to appoint to all within the special class; (b) heirs of the body in the technical sense would extend to generations in the future and such yet-to-be-born descendants could not be tenants in common with the first takers in remainder; and (c) the ultimate reference to but one "child" indicated the testator was thinking only of issue living at Williams' death. The Lord Chancellor's opinion reversing the Kings Bench and applying Shelley's Rule says that "heirs of the body" are words having their technical meaning "unless they are clearly qualified and restricted by other words so as to give them a more limited sense." *Id.* at 247. The additional words "must be clearly intelligible and unequivocal" in demonstrating the conveyor did not intend the technical meaning of "heirs of the body." *Id.* at 248.

Note that insofar as it was argued that "heirs of the body" referred only to issue living when William made an appointment, the "clearly" test was properly applied. With respect to the argument that "share and share alike" made Shelley's Rule inapplicable, the theory of *Jesson* is that these words are no more than a statement of testator's intent that Shelley's Rule should not apply. See *infra* text accompanying notes 198-215. On this theory, the conveyor did not use the words to try to change the meaning of "heirs" or "bodily heirs" so that they would have a nontechnical meaning. Thus, the "clearly" rule would have no application.

Jesson is widely followed in American Shelley's Rule cases. See, e.g., *Quick's Ex'r v. Quick*, 21 N.J. Eq. 13, 17 (Ch. 1870) (specifically relying on *Jesson* for the "clearly" rule); see also cases cited *infra* note 204.

66 *Harrell v. Hagan*, 60 S.E. 909, 911 (N.C. 1908); accord *Wool v. Fleetwood*, 48 S.E. 785, 789 (N.C. 1904).

who can qualify as heirs of the life tenant under the applicable intestacy statute. Once it is conceded that "heirs" is used in its technical sense, the presumption should be irrelevant. The North Carolina case changed the maxim from one applicable to the legal term of art itself ("heirs") to one applicable to the adjective or other word or clause appearing to modify it. The erroneously created new maxim presumes that the conveyor intended no meaning at all for the modifying word or phrase unless the intent that it have some meaning "clearly" appears. I cannot think of any logic or policy-based reasoning to support this new maxim of construction. It seems just a judicially-created device to enable Shelley's Rule to be applied when it could not otherwise be applied.

The same erroneous extension of the maxim presuming a technical meaning for a legal term of art is found in cases where the remainder was conveyed to the life tenant's "heirs equally." For example, the Illinois Supreme Court, applied Shelley's Rule to such an instrument on the ground that adding the word "equally" did not "make it perfectly clear the word [heirs] was not used in its proper legal sense."⁶⁷ The argument for not applying Shelley's Rule in this kind of case is not that the word "heirs" refers to persons in addition to or less than the group technically identified under the heirship statute, but that per capita mode of distribution might vary from the share each heir would take under the statutory scheme.⁶⁸

Whether a qualifying word or phrase proceeds to remove some persons from the technical class of heirs should not have to be "clearly" proved (since there is no applicable presumption to over-

⁶⁷ *Cook v. Sober*, 135 N.E. 60, 61 (Ill. 1922); *accord Moore v Brooks*, 53 Va. (12 Gratt.) 135, 152 (1855) (finding that a directive that remainder was "equally to be divided" among heirs did not "clearly" indicate "heirs" not used in technical sense); *see also Grimes v. Shirk*, 32 A. 113 (Pa. 1895) (involving devise where the remainder was to the life tenant's issue and "their heirs and assigns" and holding that the quoted words did not "unequivocally qualify" issue to establish that it did not mean heirs of the body). This type of case is discussed *infra* in text accompanying notes 198-203.

Note 65, *supra*, explains why the English case of *Jesson v. Wright*, the apparent source of the "clearly" rule, may have been applying that rule to a portion of the will other than that calling for distribution "share and share alike" to bodily heirs.

The improper use of the presumption can be found on occasion in instruments involving dispositions in remainder to the life tenant's "heirs," where the issue was not the meaning of that word but whether additional language removed one or more persons from the class, and where the Rule in Shelley's Case was not in issue. *E.g.*, *Starrett v. Botsford*, 9 A.2d 871 (R.I. 1939) (gift over to testator's "legal heirs" as determined under Rhode Island law: held that there was no intent to use "heirs" in non-technical sense "clearly indicat[ed]").

⁶⁸ *See infra* text accompanying notes 210-15.

come). If the plaintiff in the action is relying on the inapplicability of the Rule in Shelley's Case, he or she should have to establish by only a preponderance of the evidence that the apparent qualifying language was intended to remove one or more persons from the class of technical heirs.⁶⁹

Instances of remainders to "lawful heirs," "nearest heirs," "heirs male," and the like are—for purposes of applying the presumption in favor of technical usage—equivalent to a limitation like this: to A for life, then to her heirs, except that A's cousin Hepzebah shall under no circumstances ever take the property or any interest in it. Here the word "heirs" is, of course, initially used in its technical sense, but Shelley's Rule would not apply because the subsequent language removes a potential heir from the class.⁷⁰

*C. Courts Often Ignore the Maxim of Construction Requiring that
Meaning Be Given to Each Word or Phrase, with None Treated
as Surplusage*

A second familiar maxim used by courts in construing written instruments requires "giving effect to every word and rejecting none as meaningless or repugnant."⁷¹ This maxim should be held applicable

69 Likewise, if the plaintiff seeks affirmative relief on the basis that Shelley's Rule eliminates a linguistically-granted remainder, he or she should have to prove by the preponderance of the evidence that words in the deed or will that arguably remove one or more persons from the class were not intended to have that effect and are surplusage.

70 See *infra* notes 83–84. In *Seymour v. Heubaum*, 211 N.E.2d 897 (Ill. App. Ct. 1965), it was contended that language apart from the remainder to the life tenant's heirs indicated the conveyor considered two stepdaughters the equivalent of children so that the class of heirs was expanded to include the stepdaughters. The theory was not that "heirs" when used in the remainder clause meant other than heirs in the technical sense, but instead that subsequent language added persons to the class of heirs. Therefore, the court did not have occasion on the facts to opine, as it did, that it must "clearly and affirmatively" appear that the conveyor did not use the word "heirs" in its technical sense. *Id.* at 901.

71 *Jones v. Johnson*, 307 N.E.2d 222, 224 (Ill. App. Ct. 1974); *accord* *Pass v. Stephens*, 198 P. 712, 714 (Ariz. 1921); *Ramsey v. Nordloh*, 354 P.2d 513, 514 (Colo. 1960); *Miller v. Ridgley*, 117 N.E.2d 759, 760–61 (Ill. 1954); *Weaver v. Ellis*, 469 N.E.2d 251, 253 (Ill. App. Ct. 1984); *Goin v. Eater*, 438 N.E.2d 234, 236 (Ill. App. Ct. 1982); *Fenstermaker v. Holman*, 62 N.E. 699, 700 (Ind. 1902); *Hemenway Mem'l Presbyterian Church v. Aigner*, 443 N.E.2d 93, 94 (Ind. Ct. App. 1982); *Estate of Nagl*, 408 N.W.2d 768, 771 (Iowa Ct. App. 1987); *Bank of New England, N.A. v. McKennan*, 477 N.E.2d 170, 172 (Mass. App. Ct. 1985); *Rogers v. Morgan*, 164 So. 2d 480, 484 (Miss. 1964) ("[E]ach word and clause therein should be reconciled and given a meaning if it can be reasonably done."); *Holland v. Holland*, 509 S.W.2d 91, 94 (Mo. 1974) (give effect to all language "unless so repugnant or meaningless that it cannot

to every case in which Shelley's Rule is invoked where the conveyor has deliberately qualified the term "heirs" with an adjective or modifying phrase. As will be shown below, in such cases like, the courts have almost always ignored the maxim while concluding that a word that seems to qualify "heir," such as "lawful" or "nearest," has no meaning and is mere surplusage.⁷² This allows Shelley's Rule to eliminate the apparent remainder. Such an approach refuses to apply the "ordinary rules of construction" and also can be viewed as construing the instrument with the objective of making the Rule in Shelley's Case applicable.

One of the few cases where the maxim requiring giving effect to each word was applied in the Shelley's Rule context involved a deed of land "to Nancy West, and her present heirs."⁷³ It was argued that the Rule applied and Nancy took a fee simple absolute because the clause should be read as "to Nancy West for life and then to her heirs." This contention stressed the absence of words of inheritance before the comma after Nancy West's name and urged that the word "present" did not qualify the word "heirs." The latter contention was rejected by the Indiana Supreme Court, which declared that "[w]ords deliberately put into a deed, and put there for a purpose, are not to be lightly considered, or arbitrarily put aside."⁷⁴ To give meaning to the word "present," the court construed the phrase "present heirs" to mean children of Nancy alive when the deed was delivered.⁷⁵ Shelley's Rule then could not apply.

be done"); *Fleischman v. Furgueson*, 119 N.E. 400, 401 (N.Y. 1918); *Haas v. Speenburgh*, 203 N.Y.S. 202, 204 (Sup. Ct. 1924), *aff'd mem.*, 207 N.Y.S. 847 (App. Div. 1925); *Griffin v. Springer*, 92 S.E.2d 682, 684 (N.C. 1956); *Highland v. Pennsylvania*, 161 A.2d 390, 402 (Pa. 1960); *Yuscavage v. Hamlin*, 137 A.2d 242, 244 (Pa. 1958) ("[N]o part shall be rejected if it can be given a meaning."); *Third Nat'l Bank v. Stevens*, 755 S.W.2d 459, 462 (Tenn. Ct. App. 1988); *Alford v. Krum*, 671 S.W.2d 870, 872 (Tex. 1984) (requiring courts to recognize that parties to instrument intended every clause to have an effect), *overruled on other grounds by* *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991); *Republic Nat'l Bank v. Fredericks*, 283 S.W.2d 39, 44-45 (Tex. 1955); *Estate of Little*, 721 P.2d 950, 960 (Wash. 1986); *Fowler v. Tarbet*, 274 P.2d 341, 342 (Wash. 1954) (requiring courts to "give some meaning to every word, if reasonably possible"); *Hodgins v. State*, 513 P.2d 304, 307 (Wash. Ct. App. 1973) ("In the construction of a deed, a court must give meaning to every word if reasonably possible.").

⁷² See *infra* text accompanying notes 135-66 and 181-97.

⁷³ *Fountain County Coal & Min. Co. v. Beckleheimer*, 1 N.E. 202 (Ind. 1885).

⁷⁴ *Id.* at 203.

⁷⁵ There were six such children, and hence a seven-party tenancy in common was created by the limitation.

D. *The Maxims that a Deed of Realty Is Presumed to Convey the Grantor's Entire Interest and that a Will Should Be Construed to Avoid Partial Intestacy Have Also Been Ignored in Some Shelley's Rule Cases*

Assume a devise or grant clause in a deed conveying land "to A for life or until remarriage, and after A's death or remarriage, to A's heirs." The presumption that "heirs" is used in its technical sense can be applied here. If so, the conveyor has failed to provide who shall take the estate on A's remarriage, because A has no heirs until he dies.⁷⁶ But there is no such "gap" if "heirs" is construed to mean children or issue per stirpes then living. Employing the maxim of construction that a technical word such as "heirs" is presumed to be used in its technical sense results, in the case of a will, in a conflict with "the canon of construction that there is a presumption against [partial] intestacy."⁷⁷ In the case of a deed, it conflicts with the maxim presuming that the grantor "intended a complete disposition of the property"⁷⁸ that is the subject of the grant. If "heirs" has its technical meaning, the quoted clause makes no provision for persons to take the property on A's remarriage. There is a partial intestacy⁷⁹ or an

76 See, e.g., *Faulkner's Guardian v. Faulkner*, 35 S.W.2d 6 (Ky. 1931).

77 RESTATEMENT OF PROPERTY § 115 cmt. a (1936); accord *Hilton v. Kinsey*, 185 F.2d 885, 889 (D.C. Cir. 1950); *Beardsley v. Johnson*, 134 A. 530, 534 (Conn. 1926); *Bates v. Kingsley*, 102 N.E. 306, 307 (Mass. 1913); *Wachovia Bank & Trust Co. v. Miller*, 25 S.E.2d 177, 179 (N.C. 1943); 2A RICHARD R.B. POWELL, REAL PROPERTY § 24.04[2] (Patrick Rohan ed., rev. ed. 1996). The "gap" in the devise at issue arising if "heirs" is taken in its technical sense has been called an "interstitial intestacy." *SIMES & SMITH*, *supra* note 1, § 843, at 336, quoted in 2 *TIFFANY*, *supra* note 3, § 334, at 60.

If the will with such a specific devise containing a gap concludes with a residuary clause, the applicable maxim is not against partial intestacy, but favoring a construction by which the testator or testatrix disposes of his or her entire interest in the land in the devise clause dealing with that land. This is illustrated by *In re Berardini's Will*, 213 N.Y.S.2d 27 (Sup. Ct. 1961), *aff'd without opn.*, 226 N.Y.S.2d 677 (App. Div. 1962), where the testator bequeathed \$75,000 in trust for his daughter Loretta for life. Should she remarry, her interest would terminate and pass to her children as each attained age 21. Three sons of the testator were residuary legatees. The "gap" here was the failure to name the remainderpersons to take on Loretta's death when, as happened, she did not remarry. To prevent this remainder from falling into the residuary estate, the court inferred that the testator would rather have had Loretta's children take at her death. See also *Casey v. Gallagher*, 227 N.E.2d 801, 811-12 (Ohio 1967) (filling gap in scheme for disposition of trust income).

78 2A POWELL, *supra* note 77, § 24.04[2] (citing *Brock v. Hall*, 206 P.2d 360 (Cal. 1949)); see also RESTATEMENT OF PROPERTY § 115 (1936).

79 Unless the will has a residuary clause, in which case the broader maxim favoring a complete disposition in the language of conveyance itself is the maxim being disregarded. See *supra* note 77.

incomplete disposition by deed. No living person has heirs. Thus, on A's remarriage, the fee simple title is in the grantor (if alive) or her heirs.⁸⁰ The two rules in favor of complete disposition would have the court construe "heirs" to mean "issue of A" if she had any living at the time she acquired an interest in the land. Under this approach there are persons⁸¹ to take the estate if A's interest ends either by her remarriage or death.

Conveyance clauses like the one quoted above—with the life estate determinable on marriage and a remainder to the life tenant's heirs—seldom appear in reported decisions. As discussed below,⁸² although one case has construed "heirs" in this context to mean "issue," no court has recognized the significance to such an instrument of the maxim favoring complete disposition and disfavoring the conclusion that there was an interest retained by the conveyor or his estate.

V. SHELLEY'S RULE DOES NOT APPLY WHEN THE INSTRUMENT QUALIFIES "HEIRS" TO EXCLUDE ONE OR MORE POTENTIAL TECHNICAL HEIRS FROM THE CLASS

The term "heirs" is not used in its technical sense and Shelley's Rule "does not apply if anyone is omitted from the class of heirs."⁸³ Example: a devise "to Edcut Dillard for life, then to his heirs excluding his brothers Charlie and Searcey."⁸⁴ By a parity of reasoning,

80 In jurisdictions where a possibility of reverter is alienable inter vivos or devisable, the grantor of the deed at issue may have subsequently conveyed the future interest to an inter vivos grantee or to a devisee, who would now have the title. At common law, the possibility of reverter was not alienable or devisable but did pass by intestate succession. See SICES & SMITH, *supra* note 1, § 1853.

81 A gift to "issue" implies a condition that if A's child dies before A's death or remarriage leaving grandchildren of A, they will take to the exclusion of the child's devisee or his or her heirs (which today would include a surviving spouse). However, a child of A who dies without issue before A's death or remarriage is not divested of his or her remainder (in the event A dies before remarrying) or executory interest (in the event A remarries). See RESTATEMENT OF PROPERTY § 249 cmt. i, illus. 3 (1940).

82 See *infra* notes 318–38 and accompanying text.

83 SICES & SMITH, *supra* note 1, § 1546; accord 1 AMERICAN LAW, *supra* note 6, §4.43, at 486.

84 This was the creative interpretation made in *Gardner v. Dillard*, 258 S.W.2d 93, 94 (Tex. Civ. App.—Galveston 1953, writ ref'd). In fact, the remainder as written was to Edcut's "lawful heirs" without other direct qualification. Elsewhere in the will, however, specific devises were made to Edcut's half-brothers, Charlie and Searcey Johnson, with the explanation in the joint will executed by Edcut's parents that the devised parcels "are all of the lands and property that they [Charlie and Searcey] shall receive from our estate." *Id.* The court concluded that the conveyors thus intended to exclude Searcey and Charlie from the class of heirs of Edcut intended to take a remain-

"heirs" is not used in the technical sense if the class *includes* relations who would not inherit intestate, such as grandchildren of the named ancestor whose parent, the ancestor's child, survives the ancestor. Another example: to A for life then to A's heirs including his illegitimate children, even if not qualified to inherit from him by the applicable statute.

An instrument excluding an heir (or including a nonheir) by name as in the Edcut Dillard example is rarely encountered. Much more commonly, Shelley's Rule is alleged to be inapplicable because the remainder is conveyed to a "restricted class of heirs of the first taker,"⁸⁵ "a particular class of heirs to the exclusion of others."⁸⁶ The subclass of heirs—an expanded class seems never to be encountered in the reported cases—is created, not by excluding potential heirs by name but by excluding a sub-group of potential heirs.

In a few decisions, American courts have realized that an adjective or phrase modifying the word "heirs" in a conveyance of a remainder interest can qualify "heirs" so that it is not used in its technical sense. In a relatively recent case, the Illinois Supreme Court dealt with a devise to the testator's nephew for life with remainder "to his heirs of blood." It held Shelley's Rule inapplicable:

[H]is heirs [of blood] are only those of his heirs who are related to him by consanguinity and would not include his widow, although the statute of this State has always, under certain conditions, made the widow an heir of her deceased husband, . . . nor include an

der interest because it would have been in addition to the land devised to the half-brothers.

Likewise, Shelley's Rule is not applicable if the language in the instrument's conveyance of the remainder is used "to designate certain individuals who are only a part, and not all, of the heirs of the first taker." *Jones v. Stone*, 279 S.E.2d 13, 18 (N.C. Ct. App. 1981). On the other hand, Shelley's Rule does apply where the conveyer uses the term "heirs" and specifies by name one or more who are included in the class. *See Taney v. Fahnley*, 25 N.E. 882 (Ind. 1890) (construing son's deed to mother for life, remainder "to her heirs in equal portions, the said Nathaniel, the maker of this deed, included"); *see also Prior v. Quackenbush*, 29 Ind. 475 (1868), discussed in *infra* note 298.

85 *Fields v. Rollins*, 119 S.E. 207, 208 (N.C. 1923) (emphasis added); *accord Wallace v. Wallace*, 106 S.E. 501 (N.C. 1921).

86 *Miller v. Harding*, 83 S.E. 25, 26 (N.C. 1914) (emphasis added). "The heirs of the life tenant must be described in such terms as to encompass all his possible heirs, ascendants, descendants, and collaterals" if Shelley's Rule is to create a fee simple. Annotation, *Modern Status of the Rule in Shelley's Case*, 99 A.L.R.2d 1161, 1176 (1965); *accord Cahill v. Cahill*, 84 N.E.2d 380, 385-86 (Ill. 1949) (stating that remainder must be conveyed to "all" who would inherit intestate from life tenant). A remainder to the restricted class of bodily heirs of the life tenant did create a fee tail under the Rule in Shelley's Case. *See supra* note 55 and text accompanying note 61.

adopted child, whom the statute puts on an equality with children by birth for the purpose of inheriting from the adopting parent. . . . The devise here is of a life estate and the remainder is not granted to the heirs generally of the life tenant, but to a restricted class of his heirs.⁸⁷

The Pennsylvania Supreme Court has noted that Shelley's Rule would not apply if the remainder were conveyed to the life tenant's "heirs now living."⁸⁸ The heirs presumptively alive when the instrument became effective could be children who would predecease the life tenant, with grandchildren ultimately being the actual heirs.⁸⁹

Another Pennsylvania case⁹⁰ involved a conveyance of a life estate to the conveyor's four sons for life and then to "each of their nearest male heirs." Since the qualifier "male" excluded females who might be heirs, the class of male heirs was not the same as heirs in the technical sense. Shelley's Rule did not apply.⁹¹

A New York case concerned a devise to the testator's son for life, but "if he leave no legitimate heirs," then to a brother of the life tenant.⁹² The court first found an implied remainder to the life tenant's "legitimate heirs" and then held that these were words of purchase: "Now the words 'legitimate heirs,' had in mind of the testator no other meaning than 'children born in lawful wedlock . . .'"⁹³ The court held that Shelley's Rule did not apply.

87 *Cahill v. Cahill*, 84 N.E.2d 380, 386-87 (Ill. 1949).

88 *McCann v. McCann*, 47 A. 743, 745 (Pa. 1901) (dictum). On the other hand, Shelley's Rule does apply where the remainder is to "surviving heirs" where the person they must survive is the life tenant. *See, e.g.,* *Watts v. Clardy*, 2 Fla. 369 (1848); *Price v. Griffin*, 64 S.E. 372 (N.C. 1909); *May v. Lewis*, 43 S.E. 550 (N.C. 1903); *Davenport v. Eskew*, 48 S.E. 223 (S.C. 1904) (construing remainder to life tenant's "remaining heirs" to mean "surviving" heirs). To be an heir, one must survive the ancestor, hence the word "surviving" is legally "superfluous." *Hiester v. Yerger*, 31 A. 122, 122 (Pa. 1895).

89 Moreover, no living person has heirs, which are determined only at his or her death.

90 *Jones v. Bower*, 20 Pa. C. 95 (1897). *See Jones v. Jones*, 51 A. 362 (Pa. 1902), which dealt with the same instrument and construed it in an identical fashion.

91 The court observed that the phrase "heirs male of the body" was the technical term for creation of a fee tail male under Shelley's Rule, but that in the will at issue "male heirs" included collaterals. *Bower*, 20 Pa. C. at 97.

92 *Lytle v. Beveridge*, 58 N.Y. 592, 594 (1874).

93 *Id.* at 604. Oddly, the court also said that "legitimate heirs" might mean "children generally"—that is, not necessarily those born in wedlock. This could suggest that *Shelley* was inapplicable because the brother devising the alternative contingent remainder was one of the technical heirs. *See infra* text accompanying notes 204-316.

In *Lytle*, the will became effective in 1823, and the life tenant died in 1829. According to my research, New York first abrogated the *filius nullius* doctrine by a stat-

A. *Contemporary Application of Shelley's Rule to a Remainder to "Lawful Heirs" Is Erroneous*

1. The Doctrine of *Filius Nullius* Was Long Ago Rejected in All American Jurisdictions

At common law, for purposes of intestate succession, an illegitimate was *filius nullius*, a child of no one.⁹⁴ He could not even be the heir of his own mother, until that judge-made rule was altered by statutes. Until the *filius nullius* doctrine was abrogated, the maxim that meaning is to be given to every word inserted in a will or deed could not be implemented in the case of a devise to A for life then to A's "lawful" heirs. Although an illegitimate was sometimes referred to as not being a "lawful" child of his parents, giving the word that meaning in the devise would not qualify the word "heirs," for the illegitimate was already by law excluded from the class.

Late in the eighteenth century, American states began by statute⁹⁵—and shortly thereafter, in one jurisdiction by case law⁹⁶—to recognize an illegitimate as heir of his or her mother. Statutes providing a means for an illegitimate's father to confer heirship status on the child were soon enacted in many states and in recent years were compelled by decisions of the United States Supreme Court concerning equal protection rights of illegitimates.⁹⁷

The earliest statutes abrogating the *filius nullius* doctrine provided only that the illegitimate was the heir of his or her mother, but such statutes altered the significance of a remainder to "lawful heirs" not only when the life tenant was a female (whose child might be her heir), but also when the life tenant was a male. That is so because the male life tenant's heir might not be his child but could be a niece or

ute enacted in 1855. 1855 N.Y. Laws 547. The *Lytle* opinion was written in 1874, after some 19 years during which illegitimates could be intestate heirs in New York. Apparently, in stressing that the testator intended to restrict the class of heirs of the life tenant to legitimates, the court forgot that the *filius nullius* doctrine, *see infra* text accompanying note 94, was applicable to the instrument involved so that the word "legitimate" was surplusage.

94 See *Central Trust Co. v. Skillen*, 138 N.Y.S. 884, 886 (1912); *In re Sheffer's Will*, 249 N.Y.S. 102, 105 (Sur. Ct. 1931); *Decker v. Meriwether*, 708 S.W.2d 390, 392 (Tenn. Ct. App. 1986).

95 See, e.g., 1796 Ky. Acts CCLXXVI, §§ 18–19, reprinted in 1 LITTELL'S LAWS 559 (1809).

96 *Heath v. White*, 5 Conn. 228 (1824) (involving intestate succession to the estate of a mother dying in 1778). The court rejected the English authorities' holdings that the word "children" in an intestate succession statute excluded illegitimates.

97 See, e.g., *Clark v. Jeter*, 486 U.S. 456 (1988); *Reed v. Campbell*, 476 U.S. 852 (1986); *Lalli v. Lalli*, 439 U.S. 259 (1978).

nephew—illegitimate offspring of his sister—a grandchild, bastard of his predeceased daughter, or even a half-brother or half sister, illegitimate child of his own mother.

2. Many Modern Cases Not Involving Shelley's Rule Recognize That a Conveyer's Use of the Term "Lawful" Expresses Intent to Exclude Illegitimates

a. Under Contemporary Policy, Illegitimates Are Included in a Class of Devisees or Grantees in Case of Doubt, But Their Exclusion Is Not Prohibited

While the old common law presumptively excluded illegitimates from a class gift in favor of a person's issue or heirs,⁹⁸ contemporary public policy is accommodating of them and requires their inclusion in the class in the event of any doubt concerning the conveyer's intent.⁹⁹ On the other hand, apart from the rights of his or her surviving spouse, a conveyer is free to exclude anyone he pleases from the benefits of his deed.¹⁰⁰ I could find no case holding that there is any ambiguity in a class gift to, for example, "legitimate" children or issue. This express terminology will exclude illegitimates.¹⁰¹

98 See *infra* text accompanying notes 124–29.

99 Persons born illegitimate, whether or not legitimated by their father, were included in class gifts in the following illustrative cases: *Eaton v. Eaton*, 91 A. 191 (Conn. 1914) (discussing gift to father's "children and descendants"); *Hicks v. Smith*, 22 S.E. 153 (Ga. 1894) (discussing gift to father's "children"); *Dunlavy v. Lowrie*, 25 N.E.2d 67 (Ill. 1939) (discussing gift to "child or children of his body"); *Conway v. Childress*, 896 S.W.2d 15 (Ky. Ct. App. 1994) (discussing gift to "heirs-at-law"); *Powers v. Steele*, 475 N.E.2d 395 (Mass. 1985) (involving gift to "issue"); *Rhode Island Hosp. Trust Co. v. Hopkins*, 172 A.2d 345 (R.I. 1961) (involving gift to "living lineal heirs"); *Scales v. Scales*, 564 S.W.2d 667 (Tenn. Ct. App. 1977) (discussing gift to "children"); *Eberlein v. Tousey*, 50 N.W.2d 454 (Wis. 1951) (involving gift to "my heirs"); accord 10 AM. JUR. 2D *Bastards* § 135, at 941 (1963).

100 See generally RESTATEMENT OF PROPERTY § 292 cmt. e (1940).

101 *Will of Hoffman*, 53 A.D.2d 55, 64 (N.Y. 1976), held that a devise to "issue" included a child born a bastard. "On the other hand," said the court, "a bequest to *legitimate* 'children' would cut off any claim an illegitimate child might assert." *Id.*

Cf. *Estate of Hoigaard*, 360 N.W.2d 360 (Minn. Ct. App. 1984) (involving a provision in a will for "issue" of the testator). A "definitions" section of the will defined "issue" as all lineal descendants, including adoptees, "except illegitimate descendants and their descendants." *Id.* at 362. This excluded an illegitimate son of the testator whom he had openly acknowledged as his in two court proceedings to fix his support obligation.

Although no case I found considered "legitimate" ambiguous, total clarity can be obtained by this type of wording: excluding any person born illegitimate, whether or not subsequently legitimated by his or her father and whether or not having status as

- b. When Shelley's Rule Is Not at Issue, Almost All Courts Hold that "Lawful" Is Not Surplusage and Excludes at Least Some Illegitimates From a Class of Children, Issue, or Heirs

Despite the contemporary policy against discrimination based on illegitimacy, in situations where Shelley's Rule is not at issue, almost all contemporary cases hold that "lawful" means the same as "legitimate" when modifying a class of takers in a deed such as "children," "issue," or "heirs." It is not surplusage and excludes at least some illegitimates from the class.

Illustrative is a 1989 case, *Presley v. Hanks*,¹⁰² which involved a will creating a trust for the benefit of "Lisa Marie Presley, and any other lawful issue I might have." Upon termination of the trust, there was to be a distribution to Elvis' "lawful children." The Tennessee Court of Appeals held that one claiming to be an illegitimate daughter was excluded from trust benefits: "Unless we disregard and give no meaning to the word 'lawful,' we are compelled to believe that the word was used to denote those born in lawful wedlock."¹⁰³

Another recent Tennessee decision¹⁰⁴ construed a devise to the testator's son William for life, then to his issue. A "definitions" section of the will defined issue as "lawful issue." William died survived by a bastard daughter he had never legitimated, but it was held she did not qualify as a remainderperson. The court cited the maxim that technical words are presumed to be used in their technical sense, concluding that it was "clearly the testator's intent that only the legitimate children of William P. Meriwether would take under this provision."¹⁰⁵ In a factually similar case from New York involving a will taking effect in 1872,¹⁰⁶ the court held:

"Lawful" is the antithesis of "unlawful" or "illegitimate." In popular usage, the words "lawful issue" have an accepted meaning. All children are "issue" of their parents, for the operation of natural

heir of his or her mother or father, as well as any person claiming through such illegitimate.

102 782 S.W.2d 482, 488 (Tenn. Ct. App. 1989).

103 *Id.* at 489.

104 *Decker v. Meriwether*, 708 S.W.2d 390, 393 (Tenn. Ct. App. 1985).

105 *Id.* The same interpretation applies when the illegitimate is a remote issue of the named ancestor. See *Last Will & Testament of Kane*, 496 N.Y.S.2d 334 (Sur. Ct. 1985) (discussing situation in which the life tenant's only child, a legitimate daughter, had given birth to an illegitimate child who was excluded because of this status from the class of the life tenant's "lawful issue" named to take the remainder).

106 At least by 1855, New York had abrogated the *filius nullius* doctrine to recognize an illegitimate as heir of his or her mother. See *supra* note 93.

laws favorable to the procreation and birth of offspring is not affected by the existence or nonexistence of a marital contract. But when this word relating to children is qualified by the adjective "lawful," it is ordinarily understood to mean those begotten and born in lawful wedlock.¹⁰⁷

A 1921 Illinois case¹⁰⁸ construed a provision of the will of Marshall Field providing that if his grandson Henry "shall die leaving lawful issue surviving," each such "child" should acquire an income interest in the trust. Henry was survived by a bastard son. "Obviously," said the Illinois Supreme Court, "'leaving lawful issue' cannot include illegitimates"¹⁰⁹

I could find only one case involving an instrument taking effect after abrogation of the *filius nullius* doctrine, that did not involve Shelley's Rule, in which the court held that the word "lawful" in "lawful heirs" or "lawful issue" is surplusage and ineffective to exclude any illegitimates from the class. A North Carolina case, *Harrell v. Ha-*

107 *Central Trust Co. v. Skillin*, 138 N.Y.S. 884, 886 (1912); *accord* *United States Trust Co. v. Maxwell*, 57 N.Y.S. 53, 56 (Sur. Ct. 1899) (stating that the words "lawful issue" have "clear, distinct and well-settled meaning"—issue "born in wedlock"). In both *Skillin* and *Maxwell*, the wills as construed excluded children born illegitimate but whose parents later married, and the legislature subsequently passed a statute making such marriage an act of legitimation. More recently, the Appellate Division has held that children born illegitimate but later legitimated, even after the testator died, are within the class of "lawful" issue or heirs. *In re Vought's Trust*, 285 N.Y.S.2d 780, 787 (1967); *see also In re Sheffer's Will*, 249 N.Y.S. 102 (Sur. Ct. 1931) (involving a testamentary disposition to testator's widow for life and then to his four children or their "lawful issue"). The court said that but for the later marriage of their parents, two bastard children of one of the testator's sons who predeceased the life tenant could not have qualified as remainderpersons.

In *Lamb v. Medsker*, 74 N.E. 1012 (Ind. Ct. App. 1905), the question concerned the meaning of the term "legitimate heirs." In explaining why it thought precedents concerning the meaning of "lawful heirs" were pertinent, the court said: "[T]he words 'legitimate heirs' have been defined to mean children born in lawful wedlock 'Legitimate' is also defined by Webster to mean lawful; lawfully begotten; born in wedlock." *Id.* at 1013.

108 *Marsh v. Field*, 130 N.E. 753 (Ill. 1921).

109 *Id.* at 754. Actually, Henry's illegitimate child did not even contest this conclusion. The battle was over a corpus interest bequeathed to "all the surviving children" of Henry, and the question was whether the requirement of being a "lawful" child, imposed in the clause bequeathing an income interest—a few lines above the corpus provision in the same paragraph of the will—implicitly attached to the gift of a corpus interest. The court held that it did. *Cf. Reinders v. Koppelman*, 7 S.W. 288 (Mo. 1888) (construing will effective in 1869 and finding that a gift to the testator's "lawful heirs" excluded his adopted daughter). Most states now reject this interpretation as a matter of public policy. *See, e.g.*, 1 AMERICAN LAW OF REAL PROPERTY § 3.04(6) (c) (iii) (Arthur R. Guadio ed., 1991).

gan,¹¹⁰ concerned a devise to the testator's daughter in fee, but if she "die without leaving a lawful heir," over to the testator's sons. The daughter died intestate survived by two illegitimate children and no legitimate issue. The North Carolina Supreme Court held that there was no defeasance because the word "lawful" was surplusage. "[T]he term does not at all mean 'legitimate' but simply the person designated by law to take by descent."¹¹¹ Under the 1799 statute partially abolishing the *filius nullius* doctrine in North Carolina,¹¹² the two illegitimates were the life tenant's heirs because she left no legitimate offspring. The sole support for the "mere surplusage" holding was a citation to a 1904 decision involving application of Shelley's Rule to a remainder to "lawful heirs."¹¹³

At least one court has recognized that the abrogation of the *filius nullius* doctrine means that use of "lawful" as a qualifier is no longer surplusage and ordinarily would exclude illegitimates, yet it declined to make this construction due to special circumstances.¹¹⁴ This occurred in what appears to be Kentucky's first case to deal with the issue after enactment in 1796 of a statute¹¹⁵ making an illegitimate the heir of his or her mother. In *Black v. Cartmell*, the original will devised land to the testator's daughter, Catherine, subject to a life estate in her husband William, with Catherine to be defeated in favor of the testator's heirs "if the said Catherine dies, without issue, before the said William."¹¹⁶ A codicil was soon executed in which the testator eliminated the disposition in William's favor; but the rewritten defeasing clause operated if Catherine "die without lawful issue."¹¹⁷ The testator died in 1833, and Catherine subsequently died survived by a bastard son born after execution of the codicil.

The Kentucky Court of Appeals acknowledged that because of the 1796 statute changing the common law, old cases holding that "lawful heirs" simply meant heirs determined by statute were not controlling in the *Black* case. In the codicil to be construed, "issue"

means descendants or offspring—and . . . the phrase "lawful descendants or offspring" would clearly exclude illegitimate, or unlawful descendants, or offspring, although they might

110 60 S.E. 909, 910 (N.C. 1908).

111 *Id.* at 911.

112 1799 N.C. Sess. Laws 522, quoted in *infra* note 160.

113 *Wool v. Fleetwood*, 48 S.E. 785 (N.C. 1904), discussed in *infra* text accompanying note 157.

114 *Black v. Cartmell*, 49 Ky. (10 B. Mon.)188 (1849).

115 1796 Ky. Acts CCLXXVI, §§ 18-19, reprinted in 1 LITTELL'S LAWS 559 (1809).

116 *Black*, 49 Ky. at 188.

117 *Id.* at 189.

inherit . . . [T]he fact that an illegitimate child may inherit from its mother, seems hardly to be a sufficient ground for saying that he is embraced in the words "lawful issue," as he certainly would not be in the words "lawful descendant."¹¹⁸

As discussed below,¹¹⁹ the court proceeded to hold that the word "lawful" had been inadvertently inserted in the codicil and was to be disregarded for this reason.

c. Instruments Referring to Illegitimates Voluntarily Legitimated by Their Father as "Lawful" Children, Issue, and Heirs, Do Not Embrace All Illegitimates Who Could Be Heirs.

Some courts have held or stated in dictum that a class of "lawful" issue or children of a father in an instrument would include children born illegitimate but later legitimated by a voluntary act of the father, as by marrying the children's mother.¹²⁰ I could find no case extending this approach to find that a lawful child or lawful issue of a father included a person born illegitimate who established paternity in a suit brought *against* the father in his lifetime and resisted by the father, or brought after the father's death.¹²¹ Such a scope for the

118 *Id.* at 193-94.

119 *See infra* text accompanying notes 169-73.

120 *See* *Traders Bank v. Goulding*, 711 S.W.2d 872 (Mo. 1986) ("lawful issue" held to exclude an illegitimate where there is no evidence of subsequent legitimation); *Riddle v. Deters Trust Co.*, 24 N.W.2d 434 (Neb. 1946) ("lawful issue" included child legitimated by natural father's compliance with California's adoption statute); *In re Vought's Trust*, 285 N.Y.S.2d 780, 787 (1967) ("lawful issue" held to include illegitimate whose father went through putative marriage ceremony); *Will of Hoffman*, 385 N.Y.S.2d 49 (App. Div. 1976) (dictum) ("lawful issue" includes illegitimates whose parents marry or attempt to marry after the child's birth); *In re Scheffer's Will*, 249 N.Y.S. 102 (Sur. Ct. 1931) ("lawful issue" held to include two children born out of wedlock to father who later married their mother).

121 A survey in Robert Silverman, Comment, *Inheritance Rights of Non-Marital Children Under Michigan's 1993 Probate Code Changes*, 1995 DET. C.L. REV. 1123, 1132 n. 65, finds that all but six American jurisdictions permit an illegitimate to sue after the death of the intestate to establish the paternity necessary to make the claimant an heir. *Id.* The article includes Oregon as one of the six, but my own research indicates that there is no such time limit there. *See* OR. REV. STAT. § 112.105 (1990).

The situs state, deciding rights in land under Shelley's Rule or otherwise, will determine the status of a potential heir of an intestate or named ancestor in an instrument of title under the law of the domicile of the child and his father at the time of the alleged legitimation. *See, e.g., Bickford v. Carden*, 221 S.W.2d 421, 423-24 (Ark. 1949); *Zuckswert v. Goss*, 304 So. 2d 704, 706-07 (La. Ct. App. 1974); *Wickware v. Session*, 538 S.W.2d 466, 470 (Tex. Civ. App. 1976, writ ref'd n.r.e.); *see also* *Estate of Dauennauer*, 535 P.2d 1005, 1006-07 (Mont. 1975); *Estate of Radke*, 505 P.2d 779,

word "lawful" would make that word mere surplusage in the type of class gift on which we are focusing, namely a gift to a named person's "lawful heirs." Certainly if all illegitimates who had qualified as heirs, whether or not based on a voluntary act of their father, were included, so would persons entitled to heirship due to adoption.¹²² Thus, all heirs would be included in, and all non-heirs excluded from, the class.

It would also seem that an extension of the existing case law concerning rights of illegitimates voluntarily legitimated by the father to illegitimates who gain heirship status without such voluntary action would require a holding that illegitimates of a mother, who does not have to take any action to establish their status as her heirs, would be included in the phrase "lawful children." This holding would be contrary to the only case on point I could find.¹²³ Once again, such inclusion of illegitimates would make the word surplusage and contrary to the maxim of construction requiring that effect be given to every word unless doing so is unreasonable.

Thus, courts are not likely to extend the holdings that include as "lawful heirs" bastards legitimated by a voluntary act of the father to other situations. Instead, the precedents restricting the meaning of "lawful" may be reconsidered because they can benefit only illegitimate children of a father. The mother, knowing her illegitimates have heirship status automatically, has no reason to do any act to voluntarily legitimate them unless she knows of the deed or will in favor

781 (Utah 1973); 15A C.J.S. *Conflict of Laws* § 14(8), at 479 (1967); Annotation, *Conflict of Laws as to Legitimacy or Legitimation or as to Rights of Illegitimates, as Affecting Descent and Distribution of Decedent's Estate*, 87 A.L.R.2d 1274 (1967). But see *Estate of Blanco*, 323 N.W.2d 671, 676 (Mich. Ct. App. 1982) (applying situs rather than domicile law concerning bases for legitimation but conceding that this is minority approach). Under the majority rule, and according to the *Restatement*, if the allegedly legitimating father and the bastard have different domiciles, the law of the father's domicile controls. RESTATEMENT OF CONFLICT OF LAWS §§ 137-141 (1934); accord RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287 cmt. f (1971) (discussing cases where state of father's domicile holds child to have been legitimated).

122 See *McIlvaine v. AmSouth Bank*, 581 So. 2d 454, 459-61 (Ala. 1991); *Estate of Heard*, 319 P.2d 637, 641-42 (Cal. 1957); *Marsh v. Field*, 130 N.E. 753, 755 (Ill. 1921); *Trenton Trust Co. v. Gane*, 8 A.2d 708 (N.J. 1939) ("surviving lawful heirs"). Older case law presumed adoptees were not included in class gifts to "lawful" children, issue, or heirs. See, e.g., *Reinders v. Koppelman*, 7 S.W. 288 (Mo. 1888) (construing remainder to "lawful heirs"); *Jenkins v. Jenkins*, 14 A. 557 (N.H. 1888) (construing "issue" as "lawful issue").

123 *In re Underhill's Estate*, 28 N.Y.S.2d 984 (Sur. Ct. 1941) (involving a trust for the benefit of an adopted child and at her death to her children and issue of any deceased child). At this time, New York courts treated the word "issue" as meaning "lawful issue." The court held that a deceased daughter's illegitimate child could not take under the trust as "lawful issue." *Id.*

of her "lawful heirs." Even if she does, there may be no procedure she can pursue, because the illegitimates already have heir status.¹²⁴

124 The case law rule under analysis is not always discriminatory against the class of lawful heirs of a female. If the claimant under the class gift is her illegitimate grandchild, whose father, her son, predeceased her (or an illegitimate collateral, such as a niece, child of the named ancestor's brother), presumably the courts giving "lawful" the broadest meaning would hold that voluntary legitimation before his death by the father predeceasing the named ancestor would bring the illegitimate into the class of her "lawful heirs." Likewise, this expansive view of "lawful" is of no benefit to a grandchild claiming under a deed or will to be the "lawful heir" of his grandfather (male ancestor), when the grandchild is an illegitimate child of the predeceased daughter of the named ancestor. She will not have done any act to voluntarily legitimate the child. The situation is the same if the claimant is an illegitimate child of a collateral female relative (predeceased) of a male named ancestor.

The fact that in these unusual situations the case law treating illegitimates voluntarily legitimated by their father as "lawful" applies when the named ancestor is a female and does not always apply when the named ancestor is a male is no reason for failing to abrogate the expansive meaning given to "lawful" as generally discriminating against illegitimate children of a female. In the great majority of cases, it will be.

In those cases where, after the death of his or her grandparent or collateral relative, an illegitimate, who predeceased the intestate, sues to establish paternity in order to inherit through his father, a curious statute of limitations problem arises. Literally, the applicable time bar will be in the statute concerning the action against the father, who may have been long dead with distribution of his estate made years before (without including the illegitimate). Because the action to establish paternity is not brought for purposes of asserting a claim *against* the father, but rather *through* him to a grandparent or collateral relative, the purpose of the statute of limitation to protect the father's estate from stale claims of heirship is not promoted by barring the suit. Suppose there is a statute of limitations providing a long time to file—or imposing no time limit at all—concerning the suit to establish paternity vis-a-vis the father. *See, e.g.,* WASH. REV. CODE ANN. § 26.26.060(1)(a) (West 1997) (stating that "any interested party," which would include child seeking to claim *through* and not *from* the father, may sue "at any time" to establish paternity). Furthermore, suppose the grandson of a South Carolina intestate brings suit in Washington to establish his paternity by the intestate's son, who died years ago while domiciled in Washington. The grandson is planning to invoke a judgment of paternity obtained in Washington in intestacy proceedings concerning his South Carolina paternal grandfather. This action is brought one year after the grandfather's death as a domiciliary of South Carolina, where by statute a direct suit against the intestate claiming he was an illegitimate's father, would be barred by the state's special limitation requiring the paternity action to be filed within the later of eight months after the death of the intestate or six months after the probating of his will. S.C. CODE ANN. § 62-2-109(2)(ii) (Law. Co-op. Supp. 1995). Should South Carolina find a policy basis for rejecting a Washington paternity determination as untimely? Its statute with the short limitations period recognizes that the illegitimate may be seeking a determination of paternity in order to claim inheritance rights "through" his deceased father. *Id.* at § 62-2-109.

In the reverse situation, where grandfather was of Washington and the predeceased father of South Carolina, should courts of the latter state permit the paternity

To summarize, where Shelley's Rule is not at issue, almost all cases construe "lawful heirs" to refer only to persons born legitimate, with one exception in some states: the class may include children legitimated by a voluntary act of their father. Illegitimate children of a mother and a father's illegitimates who gain heirship status by action initiated by them will be excluded. Thus "lawful heirs" does not mean the same thing as intestate heirs in the technical sense.

3. Older Shelley's Rule Cases Ignoring the Possibility that "Lawful" Could Qualify "Heirs" Are Explainable by the *Filius Nullius* Doctrine

It is quite understandable that decisions involving instruments from the eighteenth and the earliest part of the nineteenth centuries do not discuss whether "lawful heirs" meant something different than "heirs" in its technical sense. It did not. Because of the *filius nullius* doctrine, the word was surplusage. Indeed, in *Wolfe v. Shelley* itself, the remainder was "to the use of the heirs male of the body of the said Edward [Shelley] lawfully begotten"¹²⁵ Thus, the New Hampshire Supreme Court applied Shelley's Rule to the will of a testator, dying in 1815, who devised a life estate to two sons, with the remainder to "any lawful heirs at the time of their decease."¹²⁶ New Hamp-

suit to be filed more than a year after the father's death so that the illegitimate can make a claim through his father in Washington proceedings?

How courts will resolve these kinds of problems remains to be seen. Legislative fine tuning is obviously needed, except in Mississippi. Its statute provides that an out-of-state determination of paternity by a pre-deceased, non-Mississippian domiciliary, through whom an illegitimate claims heirship rights against a Mississippi decedent, shall not be recognized unless such determination is filed within ninety days after the death of the intestate. MISS. CODE ANN. § 91-1-15(3)(c)(ii) (1994).

125 *Wolfe v. Shelley*, 76 Eng. Rep. 206, 207 (K.B. 1581); see *Note*, *supra* note 2, at 968.

126 *Crockett v. Robinson*, 46 N.H. 454 (1866); see also *Simper's Lessee v. Simpers*, 15 Md. 160 (1860) (holding that Shelley's Rule created fee tail where the testator, who died in 1805, devised a remainder to the life tenant's "lawfully begotten" heirs male, and the *filius nullius* doctrine had been abrogated in Maryland in 1825, 1825 Md. Laws 156); *The Philadelphia Trust, Safe Deposit & Ins. Co.'s Appeal*, 93 Pa. 209 (1880) (involving an 1842 deed with remainder to life tenant's "lawfully begotten" heirs of the body); *Ogden's Appeal*, 70 Pa. 501 (1872) (dictum) (stating that Shelley's Rule would create fee tail where will of testator dying in 1841 contained remainder to "lawful issue"); *Allen v. Markle*, 36 Pa. 117, 118 (1859) (stating that there was "no doubt" Shelley's Rule created fee tail where devise of remainder was to the life tenant's "legitimate issue"). In this last case, the date of death was some time before 1848, when the transferee named as life tenant disentailed the fee tail Shelley's Rule had created. Pennsylvania first recognized an illegitimate as heir in 1855. 1855 Pa. Laws 387, 368; see *Opdyke's Appeal*, 49 Pa. 373 (1865).

shire first recognized that an illegitimate could be an intestate heir by statute in 1845.¹²⁷

The Tennessee Supreme Court, in *Campbell v. Lewisburg & Northern Railroad*,¹²⁸ dealt with a will that took effect in 1866 and contained a devise to the testator's grandson for life, "then to the heirs of his body by a legal marriage." The court explained that Shelley's Rule would have applied, but for a statute abolishing it. It declared that heirs "of a legal marriage" meant the same as heirs "of a lawful marriage." The latter phrase, in turn, meant the same as "lawful heirs" of the body.¹²⁹ Although the testator must have intended to exclude as remainderpersons bastard children and grandchildren of his grandson, the expression was, perhaps, considered to be legally redundant because it was not until legislation of 1867 that Tennessee recognized an illegitimate as heir of his mother.¹³⁰

Perhaps the most curious of these cases dealing with old instruments is *Polk v. Faris*,¹³¹ also decided by the Tennessee Supreme Court. In a 1786 deed, the grantor, "then a single woman,"¹³² conveyed property for life to a child described in the instrument as the grantor's "natural daughter." The remainder was granted to the heirs

127 See *Reynolds v. Hitchcock*, 56 A. 745 (N.H. 1903) (applying the statute making an illegitimate heir of his or her mother, 1845 N.H. Laws 238).

128 26 S.W.2d 141 (Tenn. 1930).

129 *Id.* at 144.

130 See *Laughlin v. Johnson*, 52 S.W. 816 (Tenn. 1899) (applying section 10, chapter 36, of the Tennessee Acts of 1866-67).

In the three preceding paragraphs in text, the phrase "lawful" or "legal" heirs or issue appeared in instruments with effective dates of 1815 and 1866. In both cases, the jurisdiction had yet, as of the effective date of the instrument, to—but might have been expected to—change the law to recognize an illegitimate as heir of his or her mother. In both cases, the life tenant died after statutory abrogation of the *filius nullius* doctrine. If this had been pointed out to the court as part of an argument that the qualifier "lawful" caused "heirs" to have a nontechnical meaning by excluding illegitimate heirs, would the court have dismissed this on the ground that the conveyor intended the definition of "heirs" at the time of execution of or the effective date of the will (testator's death in the case of the wills in the New Hampshire and Tennessee cases)?

It is suggested below, in the context of a choice of law clause for situs law, that a "freezing" in the instrument of the law by selecting currently applicable principles precludes application of Shelley's Rule when a change in the law of heirship is plausible. See *infra* text accompanying note 262. Thus in the two cases, there may have been a basis for rejecting Shelley's Rule, but it was not pointed out to the courts. It is for that reason that I cite them as illustrations of why the existence of the *filius nullius* doctrine can explain the failure to consider whether "lawful" or "legal" qualified "heirs."

131 17 Tenn. (9 Yer.) 209 (1836).

132 *Id.* at 210.

of the body of the life tenant "lawfully issuing," and in default of "such issue, lawfully begotten," the property would revert to the grantor.¹³³ The court found no basis for avoiding Shelley's Rule, under which the grantee took a fee tail upgraded in Tennessee to a fee simple. Counsel, arguing against the application of Shelley's Rule, stressed that the life tenant was "*nullius filiae*."¹³⁴ She could have no heirs except her own issue, and, somehow, this meant that the grantor had used "heirs of the body" to mean children only, and not issue. Because Tennessee did not abrogate the *filius nullius* doctrine until 1867, counsel was unable to make what today should be the winning point: that the grantor, specifically noting the illegitimate status of her daughter-grantee, took care to exclude from the class of heirs the grantee's own illegitimate issue, who would by statute be her heirs.

4. Modern Cases Treating "Lawful" as Surplusage in Order to Apply Shelley's Rule Are Erroneous.

The *Restatement of Property's* discussion of Shelley's Rule in 1940 noted that by that date an illegitimate was always the heir of his or her mother and that the states had statutes whereby the father could legitimate the illegitimate so he or she would be the father's heir as well.¹³⁵ However, it further noted that "additional language" inserted to qualify "heirs" could exclude illegitimates who would otherwise be in the class of heirs. Clearly, the qualifier "legitimate"¹³⁶ would have this effect, but is not "lawful" effectively the same?

Despite the modern treatment casting heirship on many illegitimates, twentieth century cases in the context of Shelley's Rule uniformly continue to treat "lawful" as mere surplusage. In most of these cases, the courts just ignore the word "lawful" as possibly restricting the class of "heirs."¹³⁷ This probably occurred because the party argu-

133 *Id.* at 211. One can ponder whether the grantor had her draftsman twice add the legally meaningless reference to "lawfully" issuing and begotten to remind her bastard daughter not to suffer the same shame and ignominy her mother had by bearing a child out of wedlock.

134 *Id.* at 216.

135 RESTATEMENT OF PROPERTY § 305 cmt. 1 (1940).

136 *See supra* text accompanying note 92.

137 *See, e.g.,* *Webbe v. Webbe*, 84 N.E. 1054 (Ill. 1908) (dictum) (construing will admitted to probate in 1888); *Myers v. Myers*, 190 N.W. 491 (Neb. 1922) (construing remainder to life tenant's "lawful heirs"); *Benton v. Baucom*, 135 S.E. 629 (N.C. 1926) (construing remainder "to [life tenant's] lawful heirs," where life tenant had illegitimate child who predeceased her); *Tyson v. Sinclair*, 50 S.E. 450 (N.C. 1905) (construing remainder "to the lawful heirs of his body"); *Britt v. Rowland*, 48 S.E. 586 (N.C. 1904) (construing remainder to female life tenant's "lawful heirs"); *McCann v. Barclay*, 53 A. 767 (Pa. 1902) (construing remainder to life tenant's "lawful heirs"; it is

ing against the application of Shelley's Rule neglected to pursue the theory that "lawful" qualified "heirs," so that the class referred to in the instrument was narrower than "heirs" in its technical sense. Other decisions simply state as a conclusion, without supporting analysis, that "lawful" does not change the meaning of "heirs." Typical is an Illinois Supreme Court decision of 1919 dealing with an 1895 deed containing a remainder to the life tenant's "lawful heirs."¹³⁸ Illinois by statute had recognized since 1829 that an illegitimate could be his mother's heir.¹³⁹ Surely it was possible that the conveyor intended to exclude this subclass of heirs by use of the word "lawful." Nevertheless, the court held that, "[t]he qualifying adjective 'lawful' . . . does not in any way change the meaning of the word 'heirs' to one of purchase rather than limitation."¹⁴⁰ This was repeated in similar conclusory fashion as recently as 1965 by the Illinois Court of Appeals which held, "[t]hat the word 'heirs' is preceded by the word 'lawful' does not affect its ordinary or technical meaning."¹⁴¹ In Illinois, this is a special rule reserved only for Shelley's Rule cases. We know this to

conceivable the will here became effective before Pennsylvania first abrogated the *filius nullius* doctrine in 1855, see *supra* note 126); *Lacey v. Floyd*, 87 S.W. 665 (Tex. 1905); *Gardner v. Dillard*, 258 S.W.2d 93 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.); *Note, supra* note 2, at 1020 (declaring without analysis that the word "lawful" qualifying heirs does not take the remainder out of the Rule in Shelley's Case).

Some late nineteenth century cases which were decided not long after the state began to recognize that an illegitimate could be an heir also just ignored "lawfully" or "lawful" as modifying "heirs." Thus, Shelley's Rule was applied to a remainder to the life tenant's "lawful heirs" in *Perkins v. McConnell*, 36 N.E. 121 (Ind. 1894) (date of testator's death not given, but *filius nullius* doctrine abrogated in Indiana by 1817; The Revised Laws of Indiana ch. XXXI, §§ 8–9 (1824) (enacted in 1817), and *Moore v. Brooks*, 53 Va. (12 Gratt.) 135 (1855) (construing an 1810 deed with remainder to life tenant's "heirs lawfully begotten," where the *filius nullius* doctrine was abrogated by 1785 Va. Acts ch. LX, §§ XVI–XVII). See also *Conger v. Lowe*, 24 N.E. 889 (Ind. 1890) (dictum) (testator's date of death 1874). In *Clarke v. Smith*, 49 Md. 106 (1878), the testator died some time before 1873, and his will devised a remainder to the life tenant's "heirs lawfully begotten." Shelley's Rule was applied. *Id.* Maryland abrogated the *filius nullius* doctrine in 1825. 1825 Md. Laws 156; see also *Earle v. Dawes*, 3 Md. Ch. 230 (1849). *Kleppner v. Laverty*, 70 Pa. 70 (1871), applied Shelley's Rule to create a fee tail under a will effective in 1869, where the remainder was to the female life tenant's "lawful issue." Pennsylvania had recognized an illegitimate as heir of his or her mother since 1855. 1855 Pa. Laws 387.

138 *Wilson v. Harrold*, 123 N.E. 563, 564 (Ill. 1919).

139 1829 Ill. Laws p. 207.

140 *Wilson*, 123 N.E. at 566.

141 *Seymour v. Heubaum*, 211 N.E.2d 897, 901 (Ill. App. Ct. 1965) (dealing with a will taking effect in 1939).

be so from the treatment of "lawful issue" in the 1921 Illinois case, discussed above,¹⁴² construing the will of Marshall Field.

This major development concerning the scope of Shelley's Rule emerged in Illinois jurisprudence without any analysis—not of the significance of the end of the doctrine of *filius nullius* and not of the potential application of the maxim that meaning should be given to every word in an instrument if reasonably possible. Both the 1919 and the 1965 Illinois opinions cite a 1903 case, *Deemer v. Kessinger*,¹⁴³ where it was argued that the testator knew the life-tenant devisee had an illegitimate child and must have intended to exclude him in confining the group of remainderpersons to "lawful" heirs of the life tenant. The *Deemer* court rejected this without analysis,¹⁴⁴ citing an 1894 case concerning a remainder to the life tenant's "legal heirs,"¹⁴⁵ and an 1895 decision concerning a remainder to "lawful heirs" of the life tenant.¹⁴⁶

Neither of these latter two decisions even hinted at the possibility that "lawful" might change the technical meaning of "heirs." These were cases where there were words qualifying "heirs" in the remainder clause, "but no notice was taken of them, so that the question of what effect they may have had on the sense in which 'heirs' was used was not involved."¹⁴⁷

In North Carolina, one finds an almost identical development of the Rule that "lawful" is mere surplusage in modern instruments when it modifies "heirs," including a key twentieth century case where the life tenant in fact had an illegitimate child. As in Illinois, the citations relied on for the mere-surplusage "rule" lead back to an analytical void. In *Paul v. Willoughby*,¹⁴⁸ the devise was to the testator's daughter Eliza Jane "during the period of her natural life,"¹⁴⁹ and at her death

142 See *supra* text accompanying notes 108–09.

143 69 N.E. 28, 29 (1903) ("Much stress is laid upon the fact that [life tenant] William Deemer had an illegitimate child which the testator sought to exclude from taking under the will by use of the term 'lawful heirs' . . .").

144 The only sentence of the opinion responding to the argument reads: "The words 'nearest,' 'legal,' 'lawful,' or similar expressions preceding the word 'heirs,' without other words of limitation, in a devise, do not convert the word 'heirs' from a word of limitation to that of purchase." *Id.*

145 *Vangieson v. Henderson*, 36 N.E. 974 (Ill. 1894) (involving a will probated in 1887).

146 *Silva v. Hopkinson*, 41 N.E. 1013 (Ill. 1895).

147 Note, *supra* note 2, at 1070.

148 169 S.E. 226 (N.C. 1933).

149 *Id.* at 227. The Rule in Shelley's Case was never mentioned specifically by the court in its opinion, although it was much debated by the parties in their briefs before the court. The court did cite a Shelley's Rule case from Illinois. See *Stisser v. Stisser*,

to "the legal heirs of her body" with an ultimate gift over to collateral heirs. Eliza Jane died, survived by an illegitimate daughter as her sole heir. Because the modifying word in the will was "legal," rather than "lawful," the opinion is dictum concerning the significance of the latter term. But the North Carolina Supreme Court treated them as interchangeable: "'Where the expression 'legal heirs' or 'lawful heirs' is used the meaning is the same as when the word 'heirs' is used alone'"¹⁵⁰ Immediately after stating this rule—that "lawful" had no meaning—the court quotes the heirship statute in effect at Eliza Jane's death¹⁵¹ that made her illegitimate child her heir, obviously unaware that statutory abrogation of the *filius nullius* doctrine was inconsistent with the notion that the word "lawful" modifying "heir" was surplusage.

Case law support in *Paul* for the notion that "lawful" had no legal significance consisted solely of one 1908 case from Illinois' analytical vacuum,¹⁵² and a 1908 North Carolina decision that did not involve Shelley's Rule, but rather discussed a clause defeasing a devisee should she "die without leaving a lawful heir."¹⁵³ In that case, the only issue of the devisee surviving her were illegitimate. But, held the court, there was no defeasance. The term "lawful" (as well as "legal"), when qualifying "heir," "does not at all mean 'legitimate,' but simply the person designated by law to take by descent."¹⁵⁴ The only authorities relied on in this 1908 opinion were two Shelley's Rule cases from

85 N.E. 240 (Ill. 1908). The court also indicated that the life tenant's child took the property after her death as her heir, which could have occurred only if Shelley's Rule had given the life tenant a fee estate. Strangely, the type of fee Eliza Jane was held to have received was a fee simple defeasible upon definite failure of issue. *Paul*, 169 S.E. at 227 (finding that Eliza Jane took a "defeasible fee"). The remainder to "heirs of the body" should have created a fee tail, converted by statute into a fee simple absolute. 1784 N.C. Sess. Laws 204, § 5. North Carolina cases recognizing that Shelley's Rule creates a fee tail when the remainder is conveyed to the "heirs of the body" of the life tenant include *Edgerton v. Harrison*, 52 S.E.2d 357, 359 (N.C. 1949), and *Leathers v. Gray*, 7 S.E. 657, 658-59 (N.C. 1888).

150 *Paul*, 169 S.E. at 228 (1933) (quoting 2 JAMES SCHOULER, LAW OF WILLS, EXECUTORS AND ADMINISTRATORS § 990 (6th ed. 1923)).

151 She died in February 1932. The statute quoted in the opinion, N.C. Sess. Laws 71, dates from 1913 and made a mother's illegitimate child her heir whether or not she had legitimate children. *Paul*, 169 S.E. at 228. Compare *infra* note 160.

152 *Stisser v. Stisser*, 85 N.E. 240 (Ill. 1908), which contained no analysis concerning the effect of the use of the word "lawful" in the instrument to modify "heirs," dismissing it as irrelevant with a cite only to *Deemer v. Kessinger*, 69 N.E. 28, 29 (Ill. 1903), discussed in *supra* note 143.

153 *Harrell v. Hagan*, 60 S.E. 909 (N.C. 1908), discussed in *supra* text accompanying notes 110-12.

154 *Id.* at 911.

North Carolina. One from 1895¹⁵⁵ involved a devise to the conveyer's son for life and then "to his lawful heir or heirs." The word "lawful," declared the court, could be stricken as "meaningless" because there can be no such thing as an unlawful heir. No authority was cited for this conclusion.¹⁵⁶

The second case cited by the North Carolina Supreme Court in 1908 also leads back to authority citing no pertinent authority. *Wool v. Fleetwood*¹⁵⁷ concerned a devise to a son, and apparently to a daughter of the testator, for life with remainder "to their lawful heirs." Shelley's Rule was applied, with the court holding: "There can be no such thing as an unlawful heir. The term 'lawful heirs' means the heirs designated by law to take from the ancestor"¹⁵⁸ This rule was announced in the context of an argument that "lawful heirs" meant children rather than an argument that it meant all heirs except illegitimates. The only case relied on was *Patrick v. Morehead*,¹⁵⁹ concerning a will taking effect in 1835 and a grandson's power to appoint the fee among his "lawful heirs." No illegitimates were involved there, and the meaning of "lawful" was not discussed.

Just as in Illinois, the case law in North Carolina, holding that "lawful" has no meaning, traces not to a case involving a life tenant who died while the *filius nullius* doctrine was in effect (which one might have anticipated), but to a precedential void. A North Carolina statute enacted in 1799, which made an illegitimate heir to his mother provided she had no legitimate children, had sufficiently abrogated the *filius nullius* doctrine to make old common law precedents about the significance of "lawful" as a modifier of "heirs" distinguishable.¹⁶⁰

155 *Francks v. Whitaker*, 21 S.E. 175, 176 (N.C. 1895).

156 *Id.* The discussion in this case about "lawful" was dictum, as the court held "heirs" was not used in its technical sense for a reason not involving adjectives or phrases directly modifying that word.

157 48 S.E. 785 (N.C. 1904).

158 *Id.* at 788.

159 85 N.C. 62 (1881). It in turn cited a case of a remainder to "lawful issue" of the life tenant, where the court said in dictum that Shelley's Rule would ordinarily apply, a fee tail being created to be converted by statute into a fee simple. *Ward v. Jones*, 40 N.C. 400 (1848). The meaning of "lawful" was not discussed; Shelley's Rule was held inapplicable for a reason unrelated to use of that word.

160 1799 N.C. Sess. Laws 522. It provided: "That where any woman shall die intestate, leaving children, commonly called illegitimate or natural, born out of wedlock, and no children born in lawful wedlock, all such estate whereof she shall die seized or possessed of, whether real or personal, shall descend to and be equally divided among such illegitimate or natural born children, and their representatives, in the same manner as if they had been born in lawful wedlock" See *Wilson v. Wilson*, 126 S.E. 181, 182 (1925) (dictum) (under 1799 law bastard would inherit from his mother if she were not survived by legitimate child).

It is worth noting that the authorities cited in twentieth century cases in Illinois and North Carolina for the proposition that "lawful heirs" means no more than heirs determined by law—for example, the intestate succession statutes—do not include those Shelley's Rule precedents where the remainder was to the life tenant's heirs "lawfully begotten."¹⁶¹ Surely in that posture—as in cases involving bodily heirs "lawfully issuing"¹⁶² and heirs "by a legal marriage"¹⁶³—the words "lawfully" and "lawful" cannot refer simply to those persons made heirs by a statute but can only mean legitimate heirs, excluding bastards. There is no basis for a court's holding that the word "lawful" in the term "lawful heirs" has a different meaning than "lawfully" in the term "heirs lawfully begotten."¹⁶⁴

Modern Shelley's Rule cases treating "lawful" as meaningless or as mere surplusage are wrong. First, most clearly in Illinois, the courts do not initially construe the instrument as if Shelley's Rule did not

161 See, e.g., *Nichols v. Cartwright*, 6 N.C. 137 (1812) (involving a 1798 deed to the life tenant and "her heirs lawfully begotten of her body"). Shelley's Rule was applied to create a fee tail in the grantee. Whether "lawfully begotten" qualified "heirs" was not discussed, perhaps because the *filius nullius* doctrine was in full force in North Carolina until a year after the effective date of the deed. See *supra* note 160 and accompanying text; see also *Clarke v. Smith*, 49 Md. 106, 120 (1878) (involving a remainder to "heirs lawfully begotten"); *The Philadelphia Trust, Safe Deposit & Ins. Co.'s Appeal*, 93 Pa. 209, 212 (1880) (involving remainder to "heirs of the body of the said Henrietta lawfully begotten").

162 See *Polk v. Faris*, 17 Tenn. (9 Yer.) 209, 211 (1836); *Jesson v. Wright*, 4 Eng. Rep. 230 (H.L. 1820), discussed in *supra* note 65.

163 See *Campbell v. Lewisburg & N.R.R.*, 26 S.W.2d 141, 143 (Tenn. 1930), discussed in *supra* text accompanying notes 128–29.

164 My research produced no case involving dispositions to heirs "legally issuing" or issue "legally begotten," where Shelley's Rule or some other construction problem was involved. Of course, there are many cases besides those from North Carolina discussed in the text above where Shelley's Rule was applied to a remainder to the life tenant's "legal" heirs, apparently on the theories that "legal" was either mere surplusage or directed a reference to the statutes for determining heirship. See *Pease v. Davis*, 80 N.E. 249 (Ill. 1907) (construing a remainder to "legal heirs" with no discussion as to whether "legal" qualified "heirs"); *McClen v. Sehker*, 123 N.E. 475, 476 (Ind. 1919) (involving a remainder "to his legal heirs"); *Bassett v. Hawk*, 11 A. 802, 802 (Pa. 1888) (construing a remainder "to his legal heirs"); *Chippis v. Hall*, 23 W. Va. 504, 513 (1883) (holding that a remainder to "legal heirs" contained no "words whatever of qualification").

These decisions are less subject to criticism for treating "legal" as surplusage because the conveyors rarely used the term "legally issuing" (as opposed to the frequently encountered "lawfully issuing") to exclude illegitimates.

exist,¹⁶⁵ but have a special treatment of "lawful" restricted to Shelley's Rule cases. Second, the courts refuse to apply the maxim of construction that meaning be given, if possible, to every word in the instrument.¹⁶⁶

5. Evidence that the Draftsperson Copied "Lawful" Out of a Form Book Should Not Render it a "Meaningless" Term

Probably in the overwhelming number of cases involving a remainder to the "lawful heirs" of a grantee or devisee named as life tenant, use of that term ultimately can be traced to some formbook (or sample instrument) employed by an attorney or lay draftsman. The conveyor probably did not ask the draftsman to include the word "lawful." Should such extrinsic evidence be received, and if it is believed, is there a basis for ignoring the word?

Where the instrument transfers the remainder to heirs "lawfully begotten" or "issue of a lawful marriage," or the like, it refers directly or by necessary implication to a birth in wedlock. There is no ambiguity, and, as a result, in most states extrinsic evidence should not be received to prove that the phrase actually meant "as determined by statute."¹⁶⁷

The phrase "lawful heirs" is ambiguous. In the unlikely event there is extrinsic evidence showing that the transferor did not mean to refer to legitimacy at birth, but rather to the statutes defining heirs, it must be received. I suspect that in more than ninety-nine percent

165 See *supra* text accompanying notes 48-52. Recall that in Illinois "lawful" is a meaningless term only when Shelley's Rule is at issue. Compare *supra* text accompanying notes 108-109, with *supra* text accompanying notes 138-41.

166 See *supra* text accompanying notes 71-75.

167 Under the California version of the Parol Evidence Rule, ambiguity need not appear on the face of the instrument. Ambiguity can itself be established by extrinsic evidence, with the same evidence being used to resolve the ambiguity in favor of the interpretation not apparent on the face of the document. See *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 646 (Cal. 1968), which is followed in a few states. See *In re Estate of Flowers*, 848 P.2d 1146 (Okla. 1993). It is hard to imagine a trier of fact giving credence to testimony that the conveyor stated at about the time of execution of the instrument at issue, that notwithstanding the reference in the instrument to "begotten" or "marriage," he or she meant "lawfully" or "lawful" to refer only to the statutes that determine heirship. Apparently, because the word "lawful" is included in "lawfully begotten," if such testimony is believed, ambiguity is created, and the meaning not suggested by the words on their face is given effect under the California version of the Parole Evidence Rule. Of course it is possible the conveyor may comment that he was making a provision for a bastard relative who could only take under the instrument if within the class of "heirs lawfully begotten."

For criticism of the California version of the Parol Evidence Rule see *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366, 370 (9th Cir. 1990).

of the cases the conveyor will have done or said nothing that casts light on what he or she intended by the word "lawful." On the other hand, if evidence shows that the conveyor asked counsel if "lawful" was inserted to exclude illegitimates and was told that it just refers to the statutory laws defining heirs, then that meaning can be given to "lawful heirs." Shelley's Rule would then be applicable and would defeat the conveyor's intent to create a remainder interest in heirs (including illegitimates who qualify as heirs). Otherwise the ambiguity is resolved by applying the maxim of construction requiring every word or phrase to be given meaning if reasonably possible rather than being treated as surplusage.

In the only case I could find where extrinsic evidence was taken on the significance of "lawful," it was employed not to show that the word meant something other than "legitimate" but to show that "lawful" got into the instrument by mistake and therefore did not express the conveyor's intent. There is authority that the maxim of construction requiring a court to give meaning to every word or clause in a will does not apply to a word "inadvertently used."¹⁶⁸ The Kentucky case of *Black v. Cartmell*, discussed above,¹⁶⁹ did not concern Shelley's Rule; it concerned a defeasance clause: a devise in a codicil to testator's daughter, Catherine, in fee, but if "she die without lawful issue," then to testator's heirs by way of executory interest.¹⁷⁰ Catherine survived the testator, but later died and was survived only by an illegitimate child.

The original will had left the testator's son-in-law, William, a life estate in the land in addition to Catherine's defeasible fee, and the original defeasing language was triggered by occurrence of the following condition subsequent: "if the said Catherine dies, without issue, before the said William . . ."¹⁷¹ The Kentucky Court of Appeals concluded that the addition of "lawful" to the defeasing clause in the codicil, written, the court believed, solely to eliminate William's life estate, was inadvertent, and stated that, "The introduction of the word "lawful" into the codicil, was, as we infer, the mere act of the draftsman who intended to make the codicil more *formal* than the original provision, for which it was to be a substitute, and therefore implies no special view to legitimacy of birth."¹⁷²

168 Estate of Rush, 626 A.2d 602, 604 (Pa. 1993).

169 See *supra* text accompanying notes 114-18.

170 *Black v. Cartmell*, 49 Ky. (10 B. Mon.) 188, 191 (1849).

171 *Id.*

172 *Id.* (emphasis added). Elsewhere the court said it inferred that the codicil had been written "hastily." *Id.* at 192.

I agree that in the case of an attorney-drafted will, the term "lawful" is usually added by *counsel* for the purpose of making the will sound "formal," just as so many wills say "give, devise and bequeath" rather than the adequate "give" by itself, and contain all sorts of needless gobbledygook.¹⁷³ I do not understand how a court can infer that the testator himself, however, did not read the word "lawful" and conclude from it that a court would give the word its ordinary meaning. A rule that "formal" language in an instrument of conveyance is to be disregarded or even just presumptively disregarded is fraught with danger. Is it not likely that a person's will is one of the most important documents in his or her life, and that the testator makes a very careful reading of it?

Hopefully *Black* will not be followed outside Kentucky, and will be confined to cases having the extraordinary extrinsic evidence present there—a prior operative version (not just a draft) of the instrument without the later "formal" addition of the word "lawful."

There is one "formal" addition foolishly made to far too many wills that perhaps has to be treated as meaningless by the courts: the grant of an estate to a person for his or her *natural* life. The formalizing "natural" appears to qualify the grant of the life estate in a substantial majority of the Shelley's Rule cases I read in preparing this Article.¹⁷⁴ I could find no case in any context, civil or criminal,¹⁷⁵ holding that "for his natural life" in a deed or will meant anything other than just "for life." The most apparent meaning—that "natural life" excludes periods during which the transferee remains alive only because of artificial life support efforts, such as those of a heart-lung

173 See Thomas S. Word, Jr., *A Brief for Plain English in Wills and Trusts*, 14 U. RICH. L. REV. 471 (1980).

174 The grant or devise for a person's "natural" life appears often in even the most recently litigated cases. A Westlaw search of 1994, 1995, and the first half of 1996 for opinions using the word "estate"—to eliminate criminal life-sentence cases—and either "natural life" or "natural lives" produced 30 cases involving wills or deeds with effective dates ranging from 1912 to 1993. There were five from Illinois, three each from Alabama, Ohio, and Missouri, two each from Oregon, South Carolina, and Texas, and one each from Arkansas, California, Connecticut, Georgia, Indiana, Kansas, Massachusetts, North Carolina, Pennsylvania, and Washington.

175 See *Ex parte Stewart*, 149 P.2d 689, 690 (Cal. 1944) (finding that the word "natural" was surplusage in governor's order commuting death sentence to imprisonment for "natural" life); *People v. Wright*, 50 N.W. 792, 799 (Mich. 1891) (finding the words "mere surplusage" in criminal sentence). I had expected to find—but did not—some court opining that the phrase was intended to exclude the transferee's supernatural life in heaven or hell after his or her death as a mortal on earth. *But cf. Stryker v. Sands*, 72 A.2d 175, 178 (N.J. 1950) (holding that a bequest to provide for testator's widow for her "natural life" did not include the period just following her death; and thus funds could not be used for her burial expenses).

machine—is almost absurd.¹⁷⁶ The maxim requiring meaning to be given to every word¹⁷⁷ does not demand such an unreasonable construction to give meaning to “natural.”

Black's Law Dictionary says the term “natural life” is used to distinguish a physical death from civil death occurring at common law—and by statute in several American states—when a man entered a monastery as a monk or was convicted of a crime punishable by life imprisonment.¹⁷⁸ That usage is not unreasonable, but I suspect almost all conveyors have never heard of the civil death concept, and the same is true for a majority of their attorneys who draft deeds or wills using the term “natural life.”¹⁷⁹ In any event, “lawful” as meaning legitimate when modifying terms such as “issue” and “heirs,” is simply not that obscure a usage, so cases holding “natural” in the phrase “nat-

176 Surely the conveyor does not intend to cut off funds the life tenant may need to pay for the most effective medical efforts to stave off death. There are, nevertheless, modern authorities that would support this meaning of “natural life.” California’s “Natural Death Act” begins with a legislative finding “that modern medical technology has made possible the artificial prolongation of human life beyond natural limits,” and goes on to provide for the making of a living will. CAL. HEALTH & SAFETY CODE § 7185.5(b) (West Supp. 1997); see also *In re Eichner*, 426 N.Y.S.2d 517, 531–32 (App. Div. 1980), modified sub nom. *In re Storar*, 420 N.E.2d 64 (N.Y. 1981); David R. Smith, *Legal Recognition of Neo-Cortical Death*, 71 CORNELL L. REV. 850 (1986).

A contrary notion of what constitutes the “natural” termination of life is expressed in *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996), rev’d, 117 S. Ct. 2293 (1997), stating that a death is *not* natural when the patient has either had disconnected or refused at all times to use a life-support system that will enable him or her to breathe, when that would be impossible without such assistance: “By ordering the discontinuance of these artificial life-sustaining processes or refusing to accept them in the first place, a patient hastens his death by means that are not natural in any sense.” *Id.* at 729.

177 See *supra* note 71.

178 BLACK’S LAW DICTIONARY 1026 (6th ed. 1990). I could find no case holding that a will or deed conveying property “for his natural life” to a man sentenced to life imprisonment for a crime, and thereby suffering civil death, would allow him to continue receiving income from the property despite a statute calling for the administering of his estate as if he were physically dead. See, e.g., *Holmes v. King*, 113 So. 274, 275 (Ala. 1927). It is true, however, that many cases explaining what civil death is contrast it to “natural” death. See, e.g., *Vann v. Rogers*, 142 So. 539, 540 (Ala. 1932); *Lee v. Hall Music Co.*, 35 S.W.2d 685, 687 (Tex. 1931). The term “natural life” does appear in the standard definition: “Civil death is the state of a person who, though possessing natural life, has lost all his civil rights . . .” *In re Estate of Donnelly*, 58 P. 61, 61 (Cal. 1899); accord *Breed v. Atlanta, B. & C. R. Co.*, 4 So. 2d 315, 316 (Ala. 1941); *Holmes*, 113 So. at 275 (applying such a statute); *Texas & P. Ry. Co. v. Bailey*, 18 S.W. 481, 482 (Tex. 1892).

179 With respect to a monk who is a tenant for his “natural life,” surely the monastic vows waive the income benefits even if the transferor, by using the term, intended them to continue.

ural life" to be meaningless are not on point when a court is grappling with the meaning of "lawful heirs."

B. Decisions Applying Shelley's Rule Where the Remainder is to the Life Tenant's "Nearest" Heirs Are Erroneous

Shelley's Rule case law concerning remainders to the life tenant's "nearest heirs," although much smaller, is similar in many respects to the "lawful heirs" jurisprudence. "Nearest" is treated as meaningless, just as "lawful" was. The "nearest heirs" case law presents one small difference: while I could find no Shelley's Rule decision giving meaning to the word "lawful" in "lawful heirs," there is one "nearest heirs" case where the court held Shelley's Rule inapplicable by giving meaning to the word "nearest."¹⁸⁰ By way of an example to illustrate why "nearest" should make Shelley's Rule inapplicable, consider a case where the remainder is to the life tenant's "nearest heirs," and the life tenant dies survived by one child and two grandchildren, issue of a predeceased son or daughter of the life tenant. The two grandchildren, although heirs of the second degree to the decedent, would share the estate—under a per stirpes distribution rule contained in the pertinent heirship statute—with the decedent's child, a first-degree heir. But the restriction in the instrument of conveyance favoring "nearest heirs" would exclude the grandchildren.

Interestingly, as with the "lawful heirs" case law, some of the most significant opinions are from courts in Illinois and North Carolina. In the 1887 Illinois Supreme Court case of *Ryan v. Allen*,¹⁸¹ a testatrix devised land to her stepson for life, then "to his nearest heirs." Rejecting the contention that this class did not include all potential heirs so that Shelley's Rule was inapplicable, the court held that there was no such thing in law as "nearest heirs."

[T]he law furnishes no means of determining which one or more of the common class is or are "nearest" in the quality or right of inheritance. . . . The nearest heirs are all those persons upon whom the law would cast the inheritance. . . . [N]earest heirs can be no other than heirs generally, and must include all those who stand in the

180 *Jones v. Jones*, 51 A. 362 (Pa. 1902) (construing a remainder to the life tenant's "nearest male heirs"). The court's discussion of the limiting effect of "nearest" is an alternative holding, as it initially held that the qualifier "male" eliminated the applicability of Shelley's Rule. The instrument in *Jones* is discussed in *supra* text accompanying notes 90–91.

181 12 N.E. 65 (Ill. 1887).

same relation to the ancestor in respect of the right of inheritance.¹⁸²

Thus Shelley's Rule did apply. The canon of construction requiring that meaning be given if possible to the superadded word "nearest" was not alluded to, and the only authority cited for the quoted holding was a section of *Jarman on Wills* noting that under English cases, a fee tail was created whether the words of inheritance in the conveyance were to the "heirs of the body" of the grantee or devisee or to his or her "next heir of the body."¹⁸³ Of course, the fee tail was intended to pass at the time of primogeniture to the next heir, and then the next, on down the line. The word "next" in this context, when added to the instrument, is indeed surplusage.

The concept of "nearest heirs" is not at all analogous. It calls for the use of a gradual, that is degree-counting, system of intestate succession. For example, brother or sister stands in the second degree, uncle and nephew/niece in the third, grand-nephew and first cousin in the fourth. When the contending heirs are all rather remote collaterals of the decedent, the intestate succession statutes of many states employ the concept of gradualism to determine heirship, under which the "nearest" heir or heirs prevail. Indeed, at the time of the *Ryan* decision in Illinois, the statutory scheme for descent, when no takers appeared in the first parentela of collaterals (that headed by intestate's parents), was pure gradualism.¹⁸⁴ This meant that an uncle in the third degree would take to the exclusion of first cousins, daughters of the intestate's predeceased aunt. The uncle was the "nearest

182 *Id.* at 66. This case is followed in dictum in *Deemer v. Kessinger*, 69 N.E. 28, 29 (Ill. 1903).

Carey, *supra* note 44, at 387, says *Ryan* is wrong because the language of the instrument was addressed to a situation where the life tenant's technical heirs might be unequal in degree and the conveyor intended to remove heirs more remote in degree from the class of remainderpeople.

183 The citation in the *Ryan* case is to "Jarman on Wills, 326 and citations." *Ryan*, 12 N.E. at 66. This seems to refer to 2 THOMAS JARMAN, THE LAW OF WILLS 326 (Mellville M. Bigelow ed., 5th Am. ed. 1880).

184 The pertinent statute, 1877 Ill. Laws 1, at 93, provided:

Fifth. If there is no child of the intestate or descendant of such child, and no parent, brother or sister or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate in equal degree, (computing by the rules of the civil law), and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate

Compare present law, 755 ILL. COMP. STAT. ANN. 5/2.1(g) (West 1992), under which heirship is per stirpes through the parentela headed by intestate's great grandparents and thereafter purely gradual.

heir" in the Illinois statutory scheme. The Illinois court in *Ryan* surely was aware of the approach to inheritance, preferring the "nearest" relative claiming to be an heir. The correct holding there was that Shelley's Rule did not apply, with the remainder passing by purchase to the life tenant's "nearest heirs."¹⁸⁵ If the life tenant died survived by a brother and a niece, child of a predeceased sister, both would be "heirs" under the Illinois statute that provided for representation within the parental parentela, but only the brother would own the fee in remainder, as he is a second degree relative, and the intestate's niece is a third-degree relation.

North Carolina held that the word "nearest" was surplusage in a similar case, also without citing any relevant authority. In *Crisp v. Briggs*,¹⁸⁶ land was devised to the testator's son for life, and "then it shall descend to his nearest heirs." The court applied the Rule in Shelley's Case, stating simply that "The words 'nearest heirs' mean simply 'heirs' and do not take this case out of the rule."¹⁸⁷ No authority was cited. Twelve years later, in a case where Shelley's Rule was not involved because the remainder was "to my nearest heirs" (that is, the testator's, not the life tenant's), the North Carolina Supreme Court said that giving effect to the word "nearest" would destroy the efficacy of the word 'heirs'¹⁸⁸—apparently on the theory that representation within the parentela headed by the decedent's parents was an inherent aspect of heirship. However, on this theory, a gift to a named person's "male heirs" would have to go to female heirs as well, because lack of discrimination based on gender is an inherent part of modern heirship law. The notion that a conveyor cannot qualify the class of

185 Carey, *supra* note 44, at 387 (asserting that conveyor in *Ryan* intended to remove from class of "heirs" relatives more remote in degree than those closest in degree to the ancestor).

186 96 S.E. 662 (N.C. 1918).

187 *Id.* at 663.

188 Cox v. Heath, 152 S.E. 388, 389 (N.C. 1930). In *Ratley v. Oliver*, 47 S.E.2d 703 (N.C. 1948), Shelley's Rule was again the issue. After a devise to a life tenant, the gift over was "to his nearest heirs." It was urged that this verbal formulation did not include all the heirs so that Shelley's Rule did not apply, but the court held that the argument was foreclosed by *Crisp* and *Cox*. Addition of the word "nearest" failed to show that "the deviser intended to change the rule of descent." *Id.* at 704. *Chappell v. Chappell*, 133 S.E.2d 666 (N.C. 1963), involved a disposition to the "nearest heirs" of the testator's son. The court followed *Cox* and treated the word "nearest" as if it were not in the will. *Id.* at 668.

"heirs" to whom he is transferring property is wrong¹⁸⁹ and inconsistent with scores of Shelley's Rule authorities.¹⁹⁰

Indeed, when presented with a hypertechnical factual distinction, the North Carolina courts were quick to escape from *Crisp v. Briggs* and its creation of a senseless rule fashioned, rather clearly, to enable the court to apply the intent-defeating Shelley's Rule. In *Fields v. Rollins*,¹⁹¹ decided seven years after *Crisp*, the North Carolina Supreme Court held that a remainder to the life tenant's "nearest relatives" was not controlled by *Crisp*. Here the court concluded that the word "nearest" did exclude kin more remote in degree than those closest to the decedent under a gradual system.¹⁹²

Thus North Carolina is in the position of having cases on both sides¹⁹³ of a nationwide split of authority on the question whether "nearest"—in the context of devises and bequests to "nearest heirs," "nearest relatives," and "nearest kin" rather than Shelley's Rule situations—is mere surplusage or directs the court to determine who the takers are under a gradual system although the pertinent heirship stat-

189 See Webster, *supra* note 6, at 11 n. 22 (stating that the "nearest heirs" cases in North Carolina are wrongly decided).

190 See *supra* notes 85-93 and accompanying text.

191 119 S.E. 207 (N.C. 1923); see also *Wallace v. Wallace*, 106 S.E. 501, 504 (N.C. 1921). In *Pritchett v. Thompson*, 221 S.E.2d 757, 759 (N.C. Ct. App. 1976), a remainder was devised to the "nearest next of kin" on the paternal side of testator's family. It was held that the entire devise went to one cousin who was closest in degree to the decedent, excluding others of more remote degree who were his heirs by representation under the intestate succession statute.

192 *Fields* held that the 1918 *Crisp* decision had left untouched as precedent *Miller v. Harding*, 83 S.E. 25 (N.C. 1914), where there was a remainder to the "nearest blood relatives" of the life tenant. There the court held that this would not include all the heirs, positing a case where the life tenant was survived by a sibling and nephews and nieces, issue of a predeceased sibling. Although the latter would be heirs under the representation provisions of the intestate succession statute, the surviving sibling would be the exclusive devisee of the remainder because of the language of the will. *Id.*

193 North Carolina's inconsistency was highlighted by the facts of the most recent case there involving this problem. In *Rawls v. Rideout*, 328 S.E.2d 783 (N.C. Ct. App. 1985), the testatrix made a devise of land and personalty to her husband for life, then "to my nearest (relatives) heirs." If the first mentioned noun, albeit in parentheses, controlled, degree-counting would be employed to determine the takers; but if—as held—"heirs" controlled over "(relatives)," the word "nearest" would be ignored and the takers determined under the intestate succession statute, including its provisions for representation.

ute would employ representation.¹⁹⁴ Counting cases, it seems that a slim majority does give effect to the word "nearest."¹⁹⁵

Interestingly, Illinois, which ignored "nearest" in *Ryan* in order to apply Shelley's Rule, shifts to the majority position when *Shelley* is not a factor. In 1920 the Illinois Supreme Court had to construe a disposition to a named party's "nearest akin."¹⁹⁶ It held the devisees were to be determined by degree counting, notwithstanding that the heirship statute would employ representation.

Although the majority of cases give meaning to the word "nearest" when Shelley's Rule was not an issue, I could find only a single decision taking this approach in the context of the Rule in Shelley's Case.¹⁹⁷ Each court treats "nearest" as having no meaning in order to apply Shelley's Rule. These "nearest heirs" cases strongly support the

194 The cases are collected in J. Kraut, Annotation, *Effect of word "nearest" or "immediate" in testamentary gift to "nearest heir" or "immediate heir" or the like*, 100 A.L.R.2d 1069 (1965), and R.F. Martin, Annotation, *Term "next of kin" used in will as referring to those who would take in cases of intestacy under distribution statutes, or to nearest blood relatives of designated person or persons*, 32 A.L.R.2d 296 (1953).

195 See, e.g., *Buchan v. Buchan*, 118 N.W.2d 611 (Iowa 1962) (To the "nearest heirs of my [testator's] body." A son took to the exclusion of a grandson, the child of the decedent's predeceased sibling.); *Swazey v. Jaques*, 10 N.E. 758 (Mass. 1887) (Substitutional gift; if named legatee did not survive, to his "next of kin." This was equivalent to "nearest of kin," so takers were ascertained by degree counting, not by applying the intestate succession statutes.); *Galloway v. Babb*, 90 A. 968 (N.H. 1914) ("unto my next of kin then living in equal shares." Two brothers took to the exclusion of decedent's nephews and nieces, children of predeceased siblings.); *Zeigenfus v. Snelbaker*, 118 A.2d 876 (N.J. Super. Ct. Ch. Div. 1955) (To party's "next nearest heirs at law" means those closest in degree); *Haas v. Speenburgh*, 203 N.Y.S. 202, 204 (Sup. Ct. 1924) ("[T]o be divided equally between my nearest kin." Nephews took to the exclusion of grandnephews who were heirs by representation because "the qualifying word 'nearest' must be given effect by force of the common canons of construction and not rendered meaningless and inoperative"—"every provision in a will must be given some effect."), *aff'd mem.*, 207 N.Y.S. 847 (App. Div. 1925).

See also *Kritser v. First Nat'l Bank of Amarillo*, 463 S.W.2d 751 (Tex. Civ. App.—Beaumont 1971, writ *ref'd n.r.e.*). The case involved a grant of remainder to the life tenant's "children (or child) and their heirs per stirpes." The court held that "per stirpes" modified "heirs" to make it a word of purchase. *Id.*

196 *Hammond v. Myers*, 126 N.E. 537 (Ill. 1920). This addressed a remainder following a devise for life to the named ancestor, but the court did not consider Shelley's Rule an issue, apparently because "kin" is not the equivalent of "heirs."

197 See *Jones v. Jones*, 51 A. 362 (Pa. 1902). I exclude here cases involving remainders to the life tenant's "nearest relatives" and "nearest kin," even though the courts may have made reference to Shelley's Rule, because these courts never would have applied Shelley's Rule to an unqualified remainder if the disposition were "to A for life then to A's relatives," or "to B for life then to B's kin." See *McCann v. McCann*, 47 A. 743 (Pa. 1901) (devise to son for life then "to his next nearest blood relations"); see also *supra* notes 83–86 and accompanying text.

thesis of this Article that courts are deliberately stretching legal principles to extend Shelley's Rule beyond its scope, thereby needlessly defeating the intention of many conveyors.

C. The Majority Rule that Words of Distribution Added to the Remainder to Heirs Do Not Make Shelley's Rule Inapplicable May Be Technically Correct in Some Contexts But Is Dubious Where "Equal" Shares Are Mandated

Consider an instrument in which, after conveying a life estate to A, the transferor devises or grants a remainder to "A's heirs and their heirs"¹⁹⁸ or to "A's heirs in fee simple absolute."¹⁹⁹ All but one²⁰⁰ of the non-ancient cases I read held this kind of additional language—often called words of distribution—did not make Shelley's Rule inapplicable. The theory is that the added language is no different than a statement in the instrument that the conveyor intends to use "heirs" as a word of purchase, or a statement that the conveyor's intent is that the Rule in Shelley's Case shall not apply to the instrument.²⁰¹ Since *Shelley* is a rule of law and not of construction, such intent is irrelevant.

It will be recalled that Shelley's case in effect converts "to A for life then to his heirs" to A and his heirs," with "his heirs" carrying the historical meaning of "in fee." Where the limitation is to "A for life then to his heirs and their heirs," language of inheritance is already present (the final "their heirs"). The argument against the majority rule in these cases of added words of distribution is that to convert the first "heirs"—intended by the conveyor to refer to purchasers—into words of inheritance cannot be done as the result would be two sets of

198 Shelley's Rule was applied in each of the following cases although the remainder was to the life tenant's "heirs and their heirs": *Ham v. Ham*, 21 N.C. (1 Dev. & Bat. Eq.) 598 (1837); *Jarvis v. Wyatt*, 11 N.C. (1 Hawks) 227 (1825); *Grimes v. Shirk*, 32 A. 113 (Pa. 1895); *Physick's Appeal*, 50 Pa. 128 (1865).

199 Shelley's Rule was applied in the following cases: *Kaup v. Weathers*, 135 N.E. 38 (Ill. 1922) (remainder to life tenant's heirs "in fee simple"); *Fowler v. Black*, 26 N.E. 596 (Ill. 1891) (remainder to life tenant's heirs "in fee simple"); *Kirby v. Broadus*, 145 P. 875 (Kan. 1915) ("the fee to . . . vest absolutely in the heirs"); *Morrisett v. Stevens*, 48 S.E. 661 (N.C. 1904) ("in fee simple forever"); *Clark v. Neves*, 57 S.E. 614 (S.C. 1907) ("in fee simple . . . forever"); *Sybert v. Sybert*, 254 S.W.2d 999 (Tex. 1953) ("in fee simple"); *accord Note, supra* note 2, at 1070.

200 *Jones v. Stone*, 279 S.E.2d 13 (N.C. Ct. App. 1981), discussed in *infra* text accompanying note 205.

201 See, e.g., *Sims v. Clayton*, 7 S.E.2d 724 (S.C. 1940) (commenting on a remainder to bodily heirs "in fee") (citing *Hewitt v. Hewitt*, 196 S.E. 541 (S.C. 1938)); *Simms v. Buist*, 30 S.E. 400 (S.C. 1898).

words inheritance in the instrument.²⁰² The leading English case of *Jesson v. Wright*²⁰³ demonstrated that to accept this argument—or any argument by which addition of words of distribution could negate the applicability of Shelley's Rule—would convert the Rule from one of law to one of construction. That is, the intent that the first "heirs" refer to purchasers would control.

Jesson has been widely followed in this country, not only when the words of distribution say the heirs are to take a fee but when these words speak of "dividing" the remainder between the heirs or even dividing it equally among them.²⁰⁴ Such language does not preclude applying Shelley's Rule. A contrary, recent North Carolina case²⁰⁵ held Shelley's Rule inapplicable where the remainder was "to be divided among his [life tenant's] heirs at law." The theory was that the words "to be divided" showed the testator did not intend the word "heirs" to refer to "the indefinite succession of persons from generation to generation through intestacy."²⁰⁶ This just cannot be squared with the settled doctrine in North Carolina that *Shelley* states a rule of law and not of construction, and this North Carolina decision should be considered erroneous under contemporary Shelley's Rule theory, although certainly consistent with the understanding of the principles in the fourteenth and fifteenth centuries in England.

The same result—Shelley's Rule is applied—seems to be reached in all states but Georgia,²⁰⁷ North Carolina²⁰⁸ and Texas²⁰⁹ in the arguably distinguishable situation where the remainder is not just to be

202 See *Kleppner v. Laverty*, 70 Pa. 70, 74 (1871); George B. Young, *The Rule in Shelley's Case in Illinois: A New Analysis and Suggestions for Repeal*, 45 U. ILL. L. REV. (NORTHWESTERN) 173 (1950); see also cases cited *supra* note 200.

203 4 Eng. Rep. 230 (H.L. 1820) (remainder to life tenant's heirs "share and share alike"). For a fuller discussion of the facts of *Jesson* and arguments made there against application of Shelley's Rule see *supra* note 65.

204 See *Holt v. Pickett*, 20 So. 432 (Ala. 1896) (remainder be "equally divided" between the life tenant's "heirs of her body"); *Watts v. James*, 2 Fla. 369 (1848) (remainder be "equally divided" among the life tenant's "heirs of her body"); *Clarke v. Smith*, 49 Md. 106 (1878) (to life tenant's "heirs lawfully begotten" and to be "equally divided" between them); *Moore v. Brooks*, 53 Va. (12 Gratt.) 135 (1855) (remainder to be "equally divided" among life tenant's "heirs lawfully begotten"); see also *Sisson v. Seabury*, 22 F. Cas. 238 (C.C.R.I. 1832) (No. 12,913); *Kennedy v. Kennedy*, 29 N.J.L. 185 (N.J. Sup. Ct. 1861); *King v. Beck*, 12 Ohio 390 (1843); *Simms v. Buist*, 30 S.E. 400 (S.C. 1898).

205 *Jones v. Stone*, 279 S.E.2d 13 (N.C. Ct. App. 1981).

206 *Id.* at 17.

207 *Tucker v. Adams*, 14 Ga. 548 (1854) ("to be equally divided among and between the lawful heirs of the body" of the life tenant).

208 *Cheshire v. Drewry*, 197 S.E. 1 (N.C. 1938) ("equally," "share and share alike"); *Bedford v. Jenkins*, 2 S.E. 522 (N.C. 1887) ("to be equally divided"); *Mills v. Thorne*,

"divided" among the life tenant's heirs but is conveyed to those "heirs in equal shares" or "equally"²¹⁰ or "share and share alike."²¹¹

The argument that the majority errs in treating "equally" as mere surplusage is as follows under the heirship statutes of every state there are situations where heirs take per stirpes and not per capita. Typically, where the intestate is survived by one child and two grandchildren, offspring of a child of the intestate who predeceased him or her, the division of the estate is fifty percent to intestate's child and twenty-five percent each to the two grandchildren. Stated more broadly, heirs taking per stirps do not receive equal shares except where the heirs all stand in the same degree to the intestate and the number of heirs in each stirpes is the same. Language of the instrument calling for equal division in the face of a statutory per stirpes distribution

95 N.C. 362 (1886) ("share and share equally"); *Ward v. Jones*, 40 N.C. (5 Ired.) 400 (1848) ("equally").

209 *Robinson v. Glenn*, 238 S.W.2d 169 (Tex. 1951) ("unto her bodily heirs, share and share alike"); *Wallace v. First Nat'l Bank*, 35 S.W.2d 1036 (Tex. 1931) (alternative holding) ("to his bodily heirs equally"); *Gardner v. Dillard*, 258 S.W.2d 93 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.) ("equally").

210 *Shelley* was applied in the following cases under the majority rule concerning the addition of words of distribution in the clause conveying a remainder to the life tenant's heirs: *McQueen v. Logan*, 80 Ala. 304 (1885); *Estate of Donovan*, No. CIV.A.756, 1983 WL 103280 (Del. Ch. April 14, 1983); *Cook v. Sober*, 135 N.E. 60 (Ill. 1922) (dividing "equally"); *Taney v. Fahnley*, 25 N.E. 882 (Ind. 1890) ("in equal portions"); *Hochstedler v. Hochstedler*, 9 N.E. 467 (Ind. 1886) ("equally"); *Rhodes v. Brinsfield*, 135 A. 245 (Md. 1926) ("equally"); *Stigers v. Dinsmore*, 44 A. 550 (Pa. 1899) ("divided equal"); *Cockins' Appeal*, 2 A. 363 (Pa. 1886) ("in equal amounts"); *Cooper v. Cooper*, 6 R.I. 261 (1859) ("equally"); *Davenport v. Eskew*, 48 S.E. 223 (S.C. 1904) ("equally").

Note, supra note 2, at 1077–79, 1081–82, says that the weight of authority holds that words of distribution affixed to "heirs" do not render Shelley's Rule inapplicable but questions the correctness of some of the holdings. *Id.* at 1078. RESTATEMENT OF PROPERTY § 310 cmt. e, (1940), says that "equally" and the like added to "heirs" should negate the applicability of Shelley's Rule but that such a qualification can be ignored if the court finds the conveyor actually intended to adopt the governing heirship statute even if it provided for stirpital distribution in certain situations. However, comment c says that Shelley's Rule cannot apply if the amount accorded in the instrument to a member of the class of "heirs" is different than under the applicable intestate succession statute. The overall tenor of the *Restatement* is a rejection of the majority rule concerning the effect of a direction to distribute equally or per stirpes.

211 Shelley's Rule was applied in these cases: *Sims v. Georgetown College*, 1 App. D.C. 72 (1893) ("share and share alike"); *Eiten v. Eiten*, 357 N.E.2d 810 (Ill. App. Ct. 1976) ("share and share alike"); *Knox v. Barker*, 78 N.W. 352 (N.D. 1898) ("share and share alike"); *Society Nat'l Bank v. Jacobson*, 560 N.E.2d 217 (Ohio 1990) ("share and share alike"); *Carson v. Fuhs*, 18 A. 1017 (Pa. 1890) ("in fee simple, share and share alike"); *Bullock v. Waterman St. Baptist Soc'y*, 5 R.I. 273 (1858) ("share and share alike").

unequally does show the intent of the conveyor that the heirs not take in the capacity of intestate heirs. Instead the heirship statute is implicitly incorporated by reference to constitute a class of transferees to whom shares will be distributed not according to the statutory formula but by a scheme set forth in the instrument. A perhaps more stark example of this kind of use of the heirship statute would be a deed of a fee estate "to the heirs of A [who is already dead], with those heirs under age 35 receiving shares twice the size of older heirs of A."

The same legal issue is raised by a remainder to the life tenant's "heirs per stirpes."²¹² It could happen that the life tenant's heirs were remote collaterals who would share the estate equally under a gradual system of heirship that excluded representation by issue of relatives of the same degree of kinship to the decedent as his or her heirs but who predeceased the intestate. The instrument would in such a case refer to the intestate succession statute solely to identify the devisees, while the deed or will, not the statute, would fix their share.

The theory underlying the majority rule is technical. To avoid Shelley's Rule, the conveyor must draft the instrument to change the "who," because changing the "how much" does not do so.²¹³ The group to which the remainder is conveyed still consists of the life tenant's heirs when language is added calling for equal division. To the majority of courts it is as if the conveyor had said, "I want to make it so clear that I intend the heirs to take as purchasers that I am going to alter the shares they would take under the heirship statute." The majority responds to the conveyor by saying, "That's still just an expression of your intent, which is irrelevant once you've chosen to use the word heirs."

The minority position is that "heirs" is not used in the technical sense if the conveyor's language makes it possible the person qualifying as an heir might not receive an heir's statutory share.²¹⁴ Certainly if one of the heirs were to actually receive by way of deed or will a future interest in remainder of a fraction less than he or she would

212 See *Kritsen v. First Nat'l Bank*, 463 S.W.2d 751 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).

213 This rationale was expressed in the following cases in which Shelley's Rule was applied in the face of words of distribution in the instrument describing the share each heir would receive: *Clarke v. Smith*, 49 Md. 106 (1878) (remainder to "heirs lawfully begotten, forever, to be equally divided between them"); *Bullock v. Waterman St. Baptist Soc'y*, 5 R.I. 273 (1858) (remainder to heirs "share and share alike"). See also *Fountain County Coal & Min. Co. v. Beckleheimer*, 1 N.E. 202, 206 (Ind. 1885) (to avoid Shelley's Rule, super-added language must work alteration not merely to mode of succession, but to objects of succession).

214 E.g., *Jones v. Stone*, 279 S.E.2d 13 (N.C. Ct. App. 1981).

have taken under the intestate succession statute, this relative of the life tenant is taking by purchase.²¹⁵

Examination of authorities dating from feudal England indicates that the policy basis underlying what is now called the Rule in Shelley's Case might not have been considered by judges of that time involved in the situation of a feoffment by Lord *A*'s underlord, *B*, of *B*'s eldest son, *C*, and one or more other persons, causing *C* to acquire a lesser interest than he would have by succession under the rule of primogeniture. Suppose *B* enfeoffed eldest son *C* and two younger sons *D* and *E* so that each owned a one-third interest in the manor lands *B* had previously held of *A*. An Act of Parliament in 1267²¹⁶ made the enfeoffment of *C*, the eldest son who would have taken the estate by succession, a fraud on overlord *A* because, if given effect, it would have deprived *A* (or his successor by succession) of money-producing feudal incidents of *C*'s tenure as underlord that he owed *A* if he, *C*, took his estate by succession.

According to a note in the *Yearbooks* following the report of a case from 1292,²¹⁷ "if the father enfeoff his eldest or youngest son, the lord shall not have the Relief or Heriot from him after the death of the father; by reason of the enfeoffment."²¹⁸ Although this passage says the eldest could avoid the relief if he took by enfeoffment, it ceased to be applicable to eldest sons after 1571, according to Lord Coke.²¹⁹ In that year Parliament passed a statute that declared void all enfeoffments that prevented the payment of a relief to the overlord upon the death of the feoffor (who had been the underlord).²²⁰ Coke's discus-

215 If he or she takes more, the argument can be made that the heir's share comes to him in his capacity as heir and the excess as a purchaser under the instrument. But, of course, if any one of a group of heirs gets by the instrument a share larger than he would take by intestate succession, one of the others in the class has to take less, and for this reason the class constituted by the will or deed will always be arguably different than the class of heirs in the technical sense.

216 The Statute of Marlborough, 1267, 52 Hen. 3, ch. 6, *reprinted in* 1 Statutes of the Realm 19, 20-21 (1963); *see also supra* note 7. The statute applied to enfeoffments of eldest sons that would have denied the feoffor's overlord the benefits of the feudal incident of wardship—in effect, beneficial ownership, including all rents and profits, of the lands held by the son (*C* in the scenario in text) during his minority. The incident attached only if the son took by succession rather than feoffment. Depending on how many years the son as new underlord was in wardship, this feudal incident could be more costly to the family than even the relief payable at the moment of succession. *See supra* note 6.

217 *Asserugge v. Godfrey*, Y.B. 20 Edw. I 210 (Salop Iter 1292).

218 *Id.* at 212. The relief was often the most costly feudal incident. *See supra* note 6.

219 1 COKE UPON LITTLETON § 325 (Thomas Coventry ed., 1827).

220 Fraudulent Deeds, Gifts and Alienations, 1571, 13 Eliz., ch. 5 (Eng.), *reprinted in* 4 Statutes of the Realm pt. 1, at 537-38 (1963).

sion of this statute does not suggest that he considered the 1571 statute to affect the Rule in the *Yearbooks* from 1292 that enfeoffment of the *youngest* son was valid. The younger son never would have owed a relief, as he would not have taken by succession if his eldest brother survived their father. Although it is true that if the youngest son takes *all* of the lands held by his father of the overlord, the latter is deprived of a relief for one generation.

However, in the hypothetical enfeoffment above, *C*, the eldest son, does take a one-third interest and will owe a relief to *A* due to the 1571 statute. Apparently the amount owed would be reduced compared to the size of the relief payable on *A*'s death by *C* if he then owned the entire estate rather than sharing it with two brothers. According to Littleton, if the tenure was in knight's service, the amount of the relief was cut in half if the estate inherited by the eldest son was a moiety of a knight's fee.²²¹ If the tenure was held in socage, the relief owed was the value of the quit rent and rent service which the tenant (owner) paid yearly.²²² These rents were apparently tied to the size of the estate. So it seems the enfeoffment of sons *C*, *D*, and *E* reduced the relief Lord *A* would collect. But *A* was now the overlord of three rather than just one tenurial chain, and the chances of benefiting from the other feudal incidents, such as marriage, would increase.²²³

Further research can be done on this point, but my tentative conclusion is that the feudal policies that spawned Shelley's Rule tolerated "estate planning" that reduced, but did not eliminate the feudal incidents attaching to an eldest son who would have taken the entire

221 LITTLETON'S TENURES § 113, at 227 (Henry Cary ed., 1829).

222 *Id.* at § 126.

223 Nothing I have read suggests that the overlord, after the enfeoffment of three sons of his underlord, trebling the number of persons owing feudal incidents in the next generation if heirs then took one third interests by succession under primogeniture, suffered any reduction in the benefits of wardship and marriage incidents because the chances of enjoying the benefits of these incidents had been trebled.

Of course, a court is capable of reducing by two-thirds the money payments owed by the three underlords in the generation following the enfeoffment. Such apportionment would seem to be impossible, however, for the incident (which may or may not have actually existed or have been enforced) called in law French *droit du seigneur*, see Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 667 (1995), and in Anglo-Saxon *primer noct*, see BRAVEHEART (Icon Productions/Ladd Co. Productions—Oscar winner for Best Picture 1995, in which a Scottish rebellion was ignited after the King in London ordered British lords in Scotland to take advantage of this incident). *Droit du seigneur* was the right of the lord to have sex with a subject's bride on the first night of the marriage. Whether this incident was enjoyed by an underlord taking succession of an estate held in free tenure or only by vassals apparently has not been documented.

estate by succession. From this historical basis, then, Shelley's Rule need not apply to a modern limitation whereby heirs of the life tenant take different shares than they would under the laws of intestate succession.

D. Any Choice of Law Clause Qualifying "Heirs" Should Render Shelley's Rule Inapplicable.

1. "Time" and "Place" Rules for Determining Heirship

If a court has determined that a conveyer has used the word "heirs," in what appears to be a disposition of a remainder interest, in the technical sense, heirship is determined under a statute in effect at the death of the named ancestor,²²⁴ absent a directive to the contrary in the instrument. A conclusion that language in the instrument directs the court to determine heirship under the laws in effect at some other time means the word "heirs" is not being used in its technical sense.²²⁵

The traditional rule as to which state's laws in force at the death of the named ancestor should be consulted selects the law of the situs²²⁶ of the real property.²²⁷ As discussed below, it is quite possible

224 See *Faulkner's Guardian v. Faulkner*, 35 S.W.2d 6, 7 (Ky. 1931); *In re Hood's Estate*, 239 N.W. 448, 451 (Wis. 1931); RESTATEMENT OF PROPERTY §§ 308, 305 cmt. e, illus. 1 (1940).

225 RESTATEMENT OF PROPERTY § 312 cmt. g (1940) (discussing the Rule in Shelley's Case).

226 E.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 239 (1971) (situs law determines intestate succession and validity and effect of devises in will); RESTATEMENT OF PROPERTY § 305 cmt. e (1940).

227 The intestate takers of personalty were historically referred to as "next of kin" and were determined under the law of the decedent's domicile at death. E.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 263 (1971). As has been noted, a few states have applied Shelley's Rule in cases involving personalty where the apparent remainder was conveyed to the life tenant's "heirs." See *supra* text accompanying notes 43-45. These courts view "heirs" as the equivalent to "next of kin." In these states, it is unclear whether the takers of personalty in a "mixed" gift in a will—for example *O* gives Blackacre and all personalty located therein at *O*'s death to *A* for life then to *A*'s heirs—are determinable under the law of *A*'s domicile if it is in a state other than that where Blackacre is situated. For obvious reasons in a jurisdiction where *Shelley* no longer applies, the "heirs" taking the land should be the same parties taking the personalty located there.

The situs choice of law rule has been departed from by several real property cases not involving Shelley's Rule, see *infra* text accompanying notes 245-53. However, in the area of succession to personalty, the reason for this departure—to assure unity of succession—militates against use of any law other than that of decedent's domicile to determine his next of kin. Accordingly, I believe that where personalty is involved, a choice of law clause to the law of the state of domicile of the life tenant at his death—

that in the future some states will abandon a once iron-clad choice of situs law in real property cases for a rule employing a flexible approach that looks at the interests of nonsitus states as well. Nevertheless, reference to the law in force at the domicile at death of the life tenant—indeed, any choice of law clause to a state other than the situs—must be treated as qualifying the technical meaning of “heirs” in a remainder clause in a conveyance of real property.²²⁸ Additionally, a choice of law clause even to the situs that incorporates the law in force when the instrument becomes effective—rather than the law of heirship at the time of the life tenant’s death—qualifies “heirs” so that it does not have its technical meaning. In both instances, Shelley’s Rule has no application and the artificially²²⁹ determined heirs take a remainder interest.

2. Some, But Not All, Courts Have Realized that a Directive in an Instrument to Determine Heirs Under a Law in Effect at a Time Other than the Life Tenant’s Death Renders Shelley’s Rule Inapplicable

I was able to find four reported cases where the instrument specifically, or by implication, directed that heirship be determined by a law in effect at a time prior to the death of the life tenant.²³⁰ In two of the four the court held Shelley’s Rule inapplicable for this reason.

which cannot be a named state, as the conveyor cannot know where the life tenant will be domiciled at his or her death—directing that this law be applied in determining heirs does not qualify the term “heirs” in its technical sense. It is redundant.

228 Where the instrument conveys real property, Shelley’s Rule does not apply if the instrument directs that heirship be determined by a statute that “is the one applicable to personal property [for example, the law of the life tenant’s domicile] or, even though it is one applicable to real property, it is not the same as the one that would be employed on the death of the ancestor intestate.” *RESTATEMENT OF PROPERTY* § 312 cmt. g (1940).

229 Shelley’s Rule is inapplicable even if it turns out the determination is not “artificial.” For example, a will executed today states that the life tenant’s heirs are to be determined by the law of his domicile at his death. Ten years later, the situs state enacts a statute providing that domiciliary law rather than situs law governs rights of intestate succession to land in the jurisdiction. After that the life tenant dies. The resulting application of the same law that the situs state would employ to determine heirs—domiciliary law—is not an “artificial” determination of heirship. Nevertheless, the will’s choice of law clause permanently froze the domiciliary reference, so that if the situs jurisdiction had, before testator died, reverted back to a situs rule by repeal of the law making a domiciliary reference, the determination would have been artificial. As explained below, any clause in the instrument taking choice of law away from the courts should lead to a holding that “heirs” is not used in the technical sense. See *supra* text accompanying notes 236–53.

230 In each, the reference was to situs law.

A 1959 decision involving a testamentary trust of personalty and real property in the District of Columbia²³¹ construed a will that provided that upon the death of each of various life tenants, grandchildren of testator, the decedent's share of the estate would go "absolutely to the persons who shall then be her or his heirs at law according to the laws of descent *now* in force in the said District of Columbia."²³² This was not the same, held the court, as a disposition to the life tenant's "heirs."²³³ Shelley's Rule

"does not apply if . . . the heirs are to be ascertained as of some time other than the death of the ancestor Cases of that sort would be where the remainder is to the heirs of A according to the statutes in force at the time of the making of the will"²³⁴

In an 1870 New Jersey case,²³⁵ Jacob Quick devised realty to his son, Ezekiel, for life, then "to his heirs, to be divided among them as the law directs in case of dying intestate."²³⁶ When the will was written in 1808, New Jersey intestacy law gave male heirs a share twice the size of that inherited by a female heir. Gender equality was enacted in February 1816, and the testator died in November 1816. The Rule in Shelley's Case was held inapplicable on the following basis:

[T]he testator first indicates that his paramount intention was to give [the land] to such persons as should be the heirs of Ezekiel at his death, but he as clearly indicates that he intended to control the division of it among these heirs, and that not by the law as it might stand at the death of Ezekiel, but as it then stood; "as the law directs," means this, in contradistinction to the law as it shall then stand, indicated by the words "as the law may direct."²³⁷

231 *American Sec. & Trust Co. v. Cramer*, 175 F. Supp. 367 (D.D.C. 1959).

232 *Id.* at 369 (emphasis added).

233 The court did not indicate that there had been any change in the district's heirship laws between 1901, when the will took effect, and its decision 58 years later. It is enough that there might have been a change to conclude that the will did not use the term "heirs" in its technical sense. See *American Sec.*, 175 F. Supp. 367.

234 *American Sec. and Trust Co.*, 175 F.Supp. at 374 n.17 (quoting SIMES & SMITH, *supra* note 1, § 1547).

235 *Quick's Ex'r v. Quick*, 21 N.J. Eq. 13 (1870).

236 *Id.* at 14.

237 *Id.* at 18. See also *In re Wilson's Estate*, 225 P. 283 (Cal. Ct. App. 1924), involving a remainder to the testator's heirs as "provided by the laws of the state of California, the same as if I had died intestate." The court held that the will did not use "the word 'heirs' in a technical sense." *Id.* at 289. Had it said "as the laws of California *may* provide," it would have referred to the laws in effect at the testator's death. But "*the*" laws of California meant those in effect when the will was executed. But see *Echart v. E.G. Senter & Co.*, 474 S.W.2d 14, 15 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.), involving a devise of Texas realty to a daughter and then "to the heirs of her body, according to *the* Statutes of descent and distribution," inferentially meaning the

An interesting Maryland decision recognized one intricate aspect of a choice of law clause, overlooking the more obvious reason why it precluded application of the Rule in Shelley's Case.²³⁸ An 1836 deed granted Maryland land in trust for the benefit of the grantor's daughter for life with remainder to "such person or persons as would, by the *now* existing laws of the state of Maryland, be entitled to take *an* estate in fee simple in lands by descent from her."²³⁹ This was the ultimate remainder in the deed, applicable only if the daughter died without surviving issue, which did occur. The court observed²⁴⁰ that the clause did not describe heirs in the technical sense because it did not refer to the very land conveyed under the deed but to "any estate in fee simple."²⁴¹ Under Maryland's intestacy law in effect at the date of death of the life tenant in this case, if she died owning a fee estate that was ancestral property, acquired for example by succession from her mother, the heirs would have been restricted to those of the blood of her mother.²⁴² On the other hand, if the land held in fee was not such ancestral property (for example the decedent had bought it herself), maternal and paternal kin would have shared heirship. Which group of heirs the deed referred to was "a question of no easy solution,"²⁴³ and thus the court could not hold that "persons" in the choice of law clause equated to the life tenant's heirs in the technical sense.

It seems evident from the court's reliance on this highly technical theory for holding Shelley's Rule inapplicable that it failed to see the significance of the words "now existing"²⁴⁴ in the choice of law clause, which mandated an artificial determination of heirship—that is, not

laws of the Texas situs. *Id.* (emphasis added). *Shelley* was applied, the court explained, because, "[T]he addition of these words in no way changed the bequest [sic] of the remainder or qualified it in any way . . . because a person's heirs are those who are named in the statute of descent and distribution." *Id.* at 17.

238 *Handy v. McKim*, 4 A. 125 (Md. 1886).

239 *Id.* at 126. (emphasis added).

240 This was an alternative holding. The court first held that Shelley's Rule could not vest a fee in the daughter because in 1836 Maryland had yet to abrogate the common law rule that the words "and heirs" had to be used in a deed in order to create an estate in fee. Shelley's Rule could not supplant that requirement until a statute was passed eliminating the need for "and heirs" in a deed to create in the grantee a fee estate. Common law never required "and heirs" in a will to devise an estate in fee simple. See SIMES & SMITH, *supra* note 1, § 1548, at 442.

241 *Handy*, 4 A. at 130.

242 1 MD. CODE art. XLVII, §§ 11–18 (2d ed. 1860). A version of this law was passed as early as 1820. See 1820 Md. Laws 191.

243 *Handy*, 4 A. at 130.

244 But the persons who wrote the syllabi for the case in the Maryland Reports and the Atlantic Reporter did not. They italicized the word "now."

under the law in effect at the life tenant's death but rather those laws in effect when the deed was delivered.

Similarly, a Texas court failed to see any significance in a choice of law clause in a will clearly directing application of the intestacy laws in force when the will was executed.²⁴⁵ The devise was to the testator's son for life, then to "the legal heirs then living of my said son, according to the statutes of descent and distribution now in force in Texas."²⁴⁶ Shelley's Rule was held inapplicable on the theory that the words "then living" showed "heirs" was not used in its technical sense. The theory was not that an heir had to be alive at the *testator's* death, so that "heirs" meant a class, such as descendants, that would include persons who could predecease the life tenant. Rather the court somehow believed that "then living heirs"—referring to the death of the life-tenant—was a different class than "heirs,"²⁴⁷ which is incorrect. The court must not have appreciated that this untenable theory to avoid Shelley's Rule need not have been invoked in light of the word "now" in the choice of law clause.

3. In the One Case Where the Instrument Directed Application of Nonsitus Law, the Court Failed to See the Significance of the Choice of Law Clause.

I found only one case where the instrument directed a court that would construe it to determine heirship under the law of a state which turned out not to be the situs of the land. In a relatively recent case,²⁴⁸ the Wyoming Supreme Court dealt with a will in which the testatrix devised one half of all of her estate to a son for life, remainder to "the heirs of his body who may be living at that time."²⁴⁹ The will further provided that if the son died without issue, as he in fact did, at his death his half of the estate, which included Wyoming land, "shall be divided among his heirs according to the rules of descent and distribution of the State of Illinois."²⁵⁰

The court held, in effect, that the phrase "who may be living at that time" in the first remainder clause by implication modified not

245 *Finley v. Finley*, 318 S.W.2d 478 (Tex. Civ. App.—Eastland 1958, writ *ref'd n.r.e.*).

246 *Id.* at 481. This was clearly an attorney-drafted will, and one readily infers that counsel inserted this clause for the very purpose of negating the Rule in Shelley's Case.

247 *Id.* at 482.

248 *Crawford v. Barber*, 385 P.2d 655 (Wyo. 1963).

249 *Id.* at 656.

250 *Id.* The instrument was clearly attorney-drafted, and one can infer it was prepared by an Illinois attorney, probably when the testatrix was domiciled in Illinois.

only "heirs of his body" in the initial remainder clause, but also "heirs" generally in the final clause. Somehow this meant that "heirs" was not used in the technical sense. Therefore Shelley's Rule did not apply. This was untenable. There was no qualifying phrase in the ultimate remainder provision other than the choice of laws clause. Moreover, by definition a person's heirs must be alive "at that time"—his death.

The correct holding is that Shelley's Rule did not apply because the heirs in the technical sense would be determined under Wyoming law, that of the situs of the land at issue;²⁵¹ yet the testatrix directed that they be determined under a different law, that of Illinois, demonstrating that she was not using "heirs" in its technical sense.²⁵²

4. Even Choice of Law Clauses Viewed as Referring to Situs Law at the Time of the Life Tenant's Death Are Not Surplusage and Qualify the Term "Heirs."

In many cases where the courts considered the applicability of Shelley's Rule and the disposition to "heirs" was linguistically qualified by a choice of law clause, the latter was ignored. Apparently, the court thought the clause was surplusage by construing it as referring to the heirship law of the situs state in force at the death of the life tenant, the same law the court would apply without the clause. Typical is a 1924 Illinois case²⁵³ involving a deed of Illinois land to the grantor's daughter for life, and then

to such person or persons as may be entitled to inherit real estate by descent from her, as her heirs at law, by virtue of the^[254] statute of the state of Illinois and in the same proportions to each as they would severally have been entitled to had the said property been by

251 See *In re Estate of Ray*, 287 P.2d 629, 635 (Wyo. 1955) (effect of devise in will on Wyoming realty was determined by situs law).

252 The Wyoming court ignored the choice of law clause except for a passing comment that it was ironic that Wyoming should be deciding if Shelley's Rule applied to the will, since Illinois had abolished that Rule by statute in 1953. *Crawford*, 385 P.2d at 656; 765 ILL. COMP. ANN. STAT. 345/1 (West 1993) (enacted by 1953 Ill. Laws § 1, at 1479). The opinion does not state the date of the will, but it seems likely it was after enactment of the Illinois statute, since if it predated Illinois' abolition of Shelley's Rule there would be little irony. The Wyoming court's implicit holding that the statute of Illinois abolishing Shelley's Rule is not part of Illinois' "rules of descent and distribution" would seem to be correct. The statute related to construction of instruments of conveyance.

253 *People v. Emery*, 145 N.E. 349 (Ill. 1924).

254 Recall that in New Jersey and California, this word would have caused the court to hold the reference was to the laws in effect when the deed was delivered rather than at the death of the life tenant. See *supra* notes 235-37 and accompanying text.

them inherited from the said Emily Adelaide Emery as her heirs at law.²⁵⁵

This was "redundant language," declared the court.²⁵⁶ It simply described heirs in the technical sense, so Shelley's Rule was applicable.

A similar 1877 case brought to the Pennsylvania Supreme Court²⁵⁷ involved a devise of Pennsylvania land with the ultimate remainder at the life tenant's death to

such person or persons in such shares, and for such estates and interests therein, to whom and as the same would go had she [the life tenant] died seised thereof in fee and possessed of the said trust estates and property and investments thereof agreeably to the then²⁵⁸ existing intestate laws of the state of Pennsylvania.²⁵⁹

The court said this language was the equivalent to a remainder to "heirs," so Shelley's Rule gave the life tenant a fee simple.

What the Illinois and Pennsylvania courts failed to realize was that the instruments in the cases before them directed application of situs law to determine heirship even though the court construing the deed or will might have applied a different law, such as that of the decedent's domicile.²⁶⁰ Maybe in 1877 and 1924 such a departure from the situs rule was inconceivable. It certainly is not today. Moreover

255 *Emery*, 145 N.E. at 350.

256 *Id.*

257 *William's Appeals*, 83 Pa. 377 (1877).

258 This refers to the date of death of the life tenant.

259 *Id.* at 385.

260 The same oversight appears in cases involving dispositions to "heirs" with a directive in the instrument to apply situs law where Shelley's Rule was not an issue. Thus, in *First & American National Bank v. Higgins*, 293 N.W. 585, 588 (Minn. 1940), the devise of Minnesota land was to two named persons "and to their heirs at law by right of representation, in accordance with the then laws of descent of the State of Minnesota." The instrument took effect after abolition of Shelley's Rule, so the question was whether the quoted clause was the equivalent to "and their heirs" so that a fee simple passed—as the court held—or whether a remainder was created. The decision seems wrong, in that the will by its terms permitted only an heirship statute providing for representation per stirpes to be applied. Apparently Minnesota had such a statute when the will was written; but it could have been amended—before the life tenant's death or even after the will was executed but before testator died—to provide for determination, for at least some heirs (such as remote collaterals), of heirship based on gradualism (degree counting) without representation. Because of this, the court would not have had to discuss the second reason that the choice of law clause meant that the "heirs" described were not those in the technical sense: that is due to "freezing" application of situs law. See *supra* text accompanying notes 245–53; see also *Petition of Fuller*, 40 Cal. Rptr. 393, 394 (Ct. App. 1964) (devising California land to life tenants and then to their "heirs . . . according to the laws of the State of California"—Shelley's Rule had been abolished).

the courts should hold that they need to be convinced solely by a preponderance of the evidence that the choice of law clause qualifies the word "heirs."²⁶¹ A court should not demand that the party resisting application of Shelley's Rule "clearly" show that the choice of law clause has that effect.

The possibility that a modern court might apply a law other than that of the situs to determine heirs who would inherit land—but for situs law's adoption in a choice of law clause in an instrument—is not remote. The formerly iron-clad choice of law rule in favor of situs law to determine all interests in land has been departed from many times, although usually not in cases involving a determination of heirship.²⁶²

In *Robinson v. Glenn*, 238 S.W.2d 169, 170 (Tex. 1951), the conveyance of Texas realty was to the grantor's granddaughter for life, remainder "to the issue of her body, or their descendants, in accordance with the laws of descent and distribution of the State of Texas." Since the sole issue was whether Shelley's Rule applied, and it does not in Texas where the remainder is to issue rather than heirs, the court did not need to discuss whether the word "the" called for determining heirship under the laws in effect when the will was written rather than at the death of the life tenant or whether the direction to apply situs law qualified the meaning of "bodily heirs" (had "issue" been treated as its equivalent).

261 See *supra* text accompanying notes 66–69. The facts of *Starrett v. Botsford*, 9 A.2d 871, 872 (R.I. 1939), illustrate this point. See also *Allison v. Allison's Ex'rs*, 44 S.E. 904 (Va. 1903). *Starrett* involved a disposition by the residuary clause of a will in favor of the testator's sister, with the assets—primarily personalty but with some realty included—upon her death or marriage to "be divided amongst my legal heirs in accordance with the inheritance laws of Rhode Island." *Starrett*, 9 A.2d at 872. It was urged that because Sister was one of testator's heirs, the ultimate takers should be determined artificially by looking at surviving relations of testator at the moment of Sister's death or remarriage. The court declared that "in the absence of a clearly indicated contrary intent in the will," such an artificial determination of heirs would not be made. *Id.* at 873. Since those seeking that artificial interpretation were not relying on the choice of law clause that modified the word "heirs," the court's use of the "clearly" standard may have been correct. Suppose, however, the instrument were a deed making an assignment to a trustee, and the issue was application of the Doctrine of Worthier Title, which the jurisdiction applied to personalty as well as realty. The clause modifying "heirs" is to be given some meaning if possible to render it not redundant, and that meaning need not "clearly" appear. Of course, on these facts, the "clearly" standard is satisfied. The grantor might die domiciled in a state other than Rhode Island. Thus as to the personalty assigned, the instrument "freezes" as applicable a law that might well otherwise not be employed to determine the grantor's intestate takers. At least as to the personalty, "heirs" is not used in the technical sense, and thus the Doctrine of Worthier Title should not apply to the personalty.

262 For a discussion of rejection in civil law countries of the situs rule of choice of law in dealing with a wide range of real property issues, see Peter Hay, *The Situs Rule in European and American Conflicts Law: Comparative Notes*, in *PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN CRIBBET* 109 (Peter Hay & Michael H. Hoeflich eds., 1988).

For example, at divorce, the law of the marital domicile, not the situs, is almost always used to decide if an interest owned by one spouse should be transferred to the other in the process of sorting out the parties' property rights at the termination of marriage.²⁶³ With respect to capacity to convey²⁶⁴ or encumber²⁶⁵ land, occasional decisions reject the law-of-the-situs rule, as does one modern case involving recognition of a constructive trust in land arising out of a breach of confidential relationship.²⁶⁶

In the area of succession, a few decisions—without compulsion of a borrowing statute—have rejected situs law to determine the validity of a will devising land. The law of the conveyor's domicile was considered more appropriately applied because of the interest of that jurisdiction.²⁶⁷ Even when the issue is determining heirship on

263 See, e.g., CAL. FAM. CODE § 125 (West 1994); WIS. STAT. ANN. § 861.02(1m) (West Supp. 1995) (directing application of forum law to out-of-state realty); *Ford v. Ford*, 80 Cal. Rptr. 435 (Ct. App. 1969) (holding that before enactment of statutory directive, California law of domicile applied to Illinois land); *Marriage of Day*, 904 P.2d 171 (Or. Ct. App. 1995) (applying Oregon law to California land); *Dority v. Dority*, 645 P.2d 56 (Utah 1982). Indeed, in a detailed study of the issue of applicable law for division of real and personal property at divorce, I was able to find only two cases that did not apply the forum law, which was invariably the domicile of at least one of the divorcing spouses, usually the domicile of both. *Anderson v. Anderson*, 449 A.2d 334 (D.C. 1982); *Williams v. Williams*, 390 A.2d 4 (D.C. 1978). In both of these decisions situs law was in fact applied to realty located outside the forum, but situs was not the primary reason for the choice of law. In these two District of Columbia cases one spouse had moved to the forum jurisdiction, and the court concluded the last common marital domicile (which happened to be the situs state) had the greater interest with respect to division of property. William Reppy, Jr., *Conflicts of Law Problems in the Division of Marital Property* § 10.02[4] in 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY (Matthew Bender ed., 1987).

264 See *Ducharme v. Ducharme*, 872 S.W.2d 392 (Ark. 1994), where the issue was whether duress vitiated a gift deed. The court used the "most significant relation" choice of law theory (sometimes called center of gravity), although ultimately situs law was applied.

265 *Proctor v. Frost*, 197 A. 813 (N.H. 1938), concerned the capacity of a wife to mortgage her land to secure a debt of her husband. Using interest analysis, the forum and situs state concluded that its incapacity rule was addressed only to its domiciliary wives and applied the validating law of the marital domicile, which was also where the mortgagor signed the instrument. See generally Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 Tex. L. Rev. 585 (1987) (explaining that situs law should govern real property issues only when application will implement an interest of the situs state).

266 *Rudow v. Fogel*, 426 N.E.2d 155 (Mass. App. Ct. 1981) (recognizing such an equitable interest under the law of the common domicile of affected family members while acknowledging situs law would not support such a holding).

267 *In re Estate of Janney*, 446 A.2d 1265 (Pa. 1982), applied interest analysis as the choice of law method to uphold a devise of New Jersey land under the law of the

intestacy—involved in Shelley's Rule cases—an occasional statute²⁶⁸ or case rejects situs law in favor of that of the decedent's domicile.²⁶⁹ Almost all the scholarly literature praises such use of domiciliary law

testatrix's domicile. The devisee was an attesting witness, and the court concluded that the situs state had no interest in invalidating the devise for this reason under its law, when the domiciliary state would not.

In *Folsom v. Board of Trustees*, 71 N.E. 384 (Ill. 1904), a charitable devise was invalid under the mortmain statute of testator's domicile but valid under the law of the situs state. Based on the domiciliary state's interest in protecting children from disinheritance due to pressures on a dying parent from charities, the court applied the invalidating domicile law.

Additionally, many situs states have enacted borrowing statutes that require applying the validating law of some other jurisdiction in order to avoid invalidating a devise by application of situs law. Thus, section 2-506 of the Uniform Probate Code, enacted in 15 states, provides for an alternative reference in order to validate a will with respect to formalities of execution to (a) testator's domicile at death, (b) testator's domicile at time of execution, (c) testator's habitual abode at the time of death, (d) testator's habitual abode at the time of execution, (e) the country of which testator was a national at the time of execution, (f) the country of which testator was a national at death, and (g) the place of execution. UNIF. PROBATE CODE § 2-506 (1993); see also L. Frank Chopin, *Multijurisdictional and Separate Situs Wills* § 6.04, in *INTERNATIONAL ESTATE PLANNING* (Charles G. Stephenson et al. eds., 1994) (noting that the Hague Convention on Conflict of Laws Relating to the Form of Testamentary Dispositions directs the same seven alternative references to validate on issues of formalities of execution).

For a discussion of cases where courts have applied domicile law to determine whether a will validly had disposed of real property located in another state because of a "blending clause"—one testamentary disposition covering both personal and real property—see J.H.C. Morris, *Intestate Succession to Land in the Conflict of Laws*, 85 LAW Q. REV. 339, 344 (1969).

With respect to current significance of a choice of law rule to the situs to decide real property issues, Chopin concluded that, "because a too rigid application of situs rules might defeat the testator's intent without carrying out any overriding policy objectives, most states in the United States and numerous foreign jurisdictions have relaxed the rules governing the disposition of real property." Chopin, *supra*, § 6.05, at 6-17.

268 See CAL. PROB. CODE § 120 (West 1991) (share of intestate's spouse's California land is determined by law of decedent's domicile, not situs law).

269 In *Clapp v. Tower*, 93 N.W. 862 (N.D. 1903), the intestate, a Pennsylvania domiciliary, owned land in North Dakota. At his death, North Dakota employed situs law to invalidate his will but employed domicile law to reject a claim of heirship under the North Dakota intestacy statutes. The theory was that because the land at the moment of death was subject to an executory contract of sale, equitable conversion had occurred. So courts should treat it as personalty, even though the contract had been terminated before this decision was made. Other cases where the theory of equitable conversion was used to avoid the situs rule are discussed in Moffatt Hancock, *In the Parish of St. Mary le Bow, in the Ward of Cheap*, 16 STAN. L. REV. 561 (1964). See also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 431-32 (3d ed. 1986).

of heirship in order to achieve "unity of succession" and avoid the often foolish results of scission.²⁷⁰

In sum, a directive in a deed or will that the heirs of a life tenant designated to take as remainderpersons are to be determined under the law of the situs in effect at the life tenant's death is not mere surplusage. Applying the maxim of construction that effect is to be given if reasonably possible to every phrase the conveyer has decided to add to the instrument, such a choice of law clause tells courts that in the event the forum state has a statute or case law—for example one designed to achieve unity of succession—choosing the law of an intestate's domicile to determine heirship rights in land located elsewhere, the court must nevertheless employ situs law. It can be seen, then, that *any* choice of law clause pertaining to determining heirship upon the life tenant's death causes the term "heirs" not to be used in its technical sense. The Rule in Shelley's Case is thereby rendered inapplicable.

VI. EXTENSION IN SOME STATES OF SHELLEY'S RULE TO REMAINDERS TO "ISSUE" AND "PERSONS WHO WOULD INHERIT" IN THE ABSENCE OF THE TECHNICAL WORD "HEIRS" WAS ERROR

As has been noted above, when the doctrine now known as The Rule in Shelley's Case first emerged in England, its likely purpose was to compel the son of an overlord upon his father's death to acquire ownership of his father's lands by succession so that a relief was paya-

270 See INTERNATIONAL ESTATE PLANNING ch. 6 (Charles G. Stephenson et. al. eds., 1992); WEINTRAUB, *supra* note 269, at 428–29; MORRIS, *supra* note 267, at 344; Symeon C. Symeonides, *Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029 (1987).

An example of the mischief of scission is this: Husband dies domiciled in state A, a community property state with no applicable nonbarrable share statute. Wife elects against his will, asserting rights in \$300,000 of personalty acquired by decedent's earnings during marriage and inherited land, also worth \$300,000 and located in state B, a common law state. If applied to all the assets at issue, B's law would view decedent as owner of \$600,000 worth of property and assure the widow a nonbarrable share of one third of all of it—worth \$200,000. State A considers the widow sufficiently protected due to owning half the assets traceable to decedent's earnings—a share worth \$150,000. With scission, the widow gets \$250,000—half the personalty and one third of the realty—substantially more than she would have if the succession law of only one state were applied.

A lone voice criticizing unity of succession achieved by abandoning the situs rule for determining heirship to land is Jeffrey Schoenblum, *Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents' Estates*, 32 VA. J. INT'L L. 83 (1991). See also Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291 (1992).

ble to the lord above the son on the tenurial chain and so that the son would be liable for other feudal incidents that attached only if he took his estate by succession (as opposed by deed, as under a remainder clause in favor of the father's "heir").²⁷¹ Thus when confronted with an enfeoffment by a grandfather of his son for life, then to the son's heirs, the courts converted the reference to "heirs" into words of limitation.

Moreover, if the language allegedly creating a remainder interest to which Shelley's Rule denies effect was construed to mean "then to the eldest son of the feoffee" (the person who would be the feoffee's heir), a fee estate in remainder in the grandson probably could not have been recognized at old common law due to lack of language of inheritances attached to the ultimate gift construed as being words of purchase. Unless the remainder were "then to his heir and his heirs," the life tenant's son might take only a life estate due to the absence of language of inheritance.²⁷²

Unquestionably, when Shelley's Rule was formulated, a grant from *O* to *A* for life and then to *A*'s "issue" or then "to the persons who would inherit the land at *A*'s death intestate if he owned it in fee simple absolute" could not create a fee estate in *A* for lack of the word "heirs."²⁷³ The essence of Shelley's Rule is to combine language creat-

271 See *supra* text accompanying notes 4-7.

272 See SIMES & SMITH, *supra* note 1, § 493. However, the actual word used, in cases where it is urged Shelley's Rule applies, is "heirs," not "heir." Perhaps "heirs" in a grant of an apparent remainder interest "to the heirs of son *A*, the life tenant," could carry two meanings: firstly, in singular form to refer to the feoffor's grandson; and secondly, in plural form, to be words of inheritance. A grant after the abolition of primogeniture "to the heirs of *A*" is said to give them a fee, without adding "and their heirs," apparently on the theory that the word "heirs" stated only once can do double service. See *Campbell v. Rawdon*, 18 N.Y. 412 (1858). But cf. SIMES & SMITH, *supra* note 1, § 495; RESTATEMENT OF PROPERTY § 30 (1936) (stating that when the grantor intends "heirs" to refer to specific persons, rather than those who may be the heirs if events transpire so that the heirs apparent at the time a deed is executed are not in fact the heirs, the additional "and their heirs" is needed for a fee estate to be created in the heirs of *A*). Thus, "heirs" does do double duty—naming the grantee purchasers while also serving as words of inheritance—if the deed creates an executory interest in future heirs of a living person. It also could do so if the grantor did not know the named ancestor was dead and thus could not have intended "heirs" to refer to specific persons.

273 See *supra* note 240. *Nobles v. Nobles*, 98 S.E. 715 (N.C. 1919), recognized a fee estate by application of Shelley's Rule to a devise in remainder to the life tenant's "legal representatives" on the theory this was the equivalent of a remainder to his heirs. The court implied that in 1581, when *Wolfe v. Shelley* was decided, the lack of the word "heirs" precluded upgrading the life estate to one in fee. *Id.* at 716.

ing only a life estate with a subsequent clause containing the word "heirs" so that an estate in fee results.

Several American jurisdictions adhere to this historic aspect of Shelley's Rule. "[T]he word heirs," held the Iowa Supreme Court, "is essential to justify the application of the rule, just as it was at common law to create an estate in fee simple" in a deed.²⁷⁴ In an Indiana case, the remainder in certain land was devised "to the persons who would have inherited the same in fee simple from the said William Earnhart [life tenant] had he owned the same in fee simple at the time of his death."²⁷⁵ The court held Shelley's Rule inapplicable because "persons" was not a technical term, even though the term "inherited"—which smacks of heirship—was used in describing who these "persons" were. Virginia reached the same result where the very word "heirs" was used to describe the "persons" devised the remainder.²⁷⁶

Texas²⁷⁷ and North Carolina²⁷⁸ refuse to treat a remainder to "issue" or "issue of the body" of the life tenant as identical to a remain-

274 *Brown v. Brown*, 101 N.W. 81, 82 (Iowa 1904), held Shelley's Rule inapplicable where a mother's deed to her daughter for life included a remainder "to her children, or to their lineal descendants." *Id.* at 81. In dictum the court said a remainder to the life tenant's "children" would not be treated as if it were to "heirs of the body" of the life tenant. *Id.*

275 *Earnhart v. Earnhart*, 26 N.E. 895, 895 (Ind. 1891). See *Jackson v. Jackson*, 26 N.E. 897 (Ind. 1891), holding one day before the court's decision in *Earnhardt* that Shelley's Rule was inapplicable unless remainder is to life tenant's "heirs" or "heirs of his body." *Handy v. McKim*, 4 A. 125, 126 (Md. 1886), involved an 1836 deed with remainder to "such person or persons" as would take "by descent from" the life tenant on her death intestate if she owned the fee simple. Shelley's Rule was held inapplicable. *Id.* at 132. The court said the Rule would have applied had the instrument been a will, as words of inheritance were not required to create a fee in a will, as they then were in a deed. *Id.* at 129. Because Maryland law now presumes a fee in a deed of a grant "to John Smith" with no mention of his heirs, *Handy* may no longer be good law, although it has not been specifically overruled. MD. CODE ANN. REAL PROP. § 4-105 (1996) (enacted by 1856 Md. Laws 154).

276 *Taylor v. Cleary*, 70 Va. (29 Gratt.) 448, 449 (1877), involved a deed of land to the grantor's grandson for life, then "to such person or persons as shall at the time [of his death] answer the description of heir or heirs at law of the said Thomas." The deed also stated that such "persons" were to take as purchasers, which is a basis for distinguishing *Taylor* from *Turner v. Monteiro*, 103 S.E. 572 (Va. 1920), where the court applied Shelley's Rule to a remainder to the life tenant's "descendants." In *Peer v. Hennion*, 76 A. 1084 (N.J. 1909), the remainder was "to such person or persons as shall be her [the life tenant's] heir or heirs of land held by her in fee simple." *Id.* at 1085. Shelley's Rule was held inapplicable for lack of the requisite technical terminology, even though the word "heirs" appeared in the remainder clause, although not as one of the direct objects of the verb conveying the land.

277 See *Robinson v. Glenn*, 238 S.W.2d 169 (Tex. 1951) ("issue" does not satisfy requirement of Shelley's Rule that there be language of inheritance).

der to "heirs of the body" and thus decline to recognize an instrument conveying a remainder to "issue" as a fee tail in the person named as life tenant by virtue of Shelley's Rule.

This historically-correct application of Shelley's Rule is the minority position in the United States today.²⁷⁹ A greater number of jurisdictions have dispensed with the prerequisite that the remainder be conveyed to the life tenant's "heirs" or "bodily heirs." Illinois has expanded Shelley's Rule so it applies without the word "heirs" in the remainder clause. In *People v. Emery*, a father conveyed land to his daughter for life, then "to such person or persons as may be entitled to inherit real estate by descent from her, as her heirs at law" under the Illinois intestacy statute.²⁸⁰ Shelley's Rule was held applicable even though "person or persons" were, grammatically, the remainderpersons.²⁸¹ The court's theory was that the clause was simply a description of the life tenant's "heirs[,] though the language used to express the idea is excessive."²⁸² The Illinois court did note the words "descent" and "heirs" in the language following "person or persons." The court stated that "[t]here was no definition of persons except as heirs, to take as heirs, and not as descendants, children, relatives, or in any other capacity."²⁸³ Conceivably, if the remainder

278 See *Ford v. McBrayer*, 88 S.E. 736 (N.C. 1916); *Puckett v. Morgan*, 74 S.E. 15 (N.C. 1912); *Bird v. Gilliam*, 28 S.E. 489 (N.C. 1897); *Francks v. Whitaker*, 21 S.E. 175 (N.C. 1895); *White v. Lackey*, 253 S.E.2d 13 (N.C. Ct. App. 1979). In each of the cases the remainder was to the "bodily heirs" or "heirs of the body" of the life tenant, but the courts decided, based on the context, that the conveyor really intended to use the term "issue" instead, because the conveyor envisioned the title passing just once, at the life tenant's death, not generation after generation. Having made that construction, the North Carolina courts proceeded to hold Shelley's Rule inapplicable for lack of the word "heirs." But the word "heirs" was there, and thus these cases seem inconsistent with the basic proposition that Shelley's Rule is one of law, not of construction. Under the approach in these cases, if the remainder were to the life tenant's "heirs, who shall take as purchasers," the court would change the language describing the remaindermen to "persons who would take intestate," and thus having eliminated the technical language, would decline to apply Shelley's Rule.

In early dictum, the North Carolina Supreme Court had said Shelley's Rule would create a fee tail, converted by statute into a fee simple, where the remainder was to the life tenant's "lawful issue." *Ward v. Jones*, 40 N.C. 279 (1848).

279 Note, *supra* note 2, at 1014 says that it is "not necessary" to always use the word "heirs" in the remainder for Shelley's Rule to apply. Interestingly, it then cites one case from the majority camp and three cases *contra*. *Id.* at 967 n.7.

280 145 N.E. 349, 350 (Ill. 1924).

281 *Id.*

282 *Id.*

283 *Id.* Accord *Cook v. Councilman*, 72 A. 404 (Md. 1909), where testator devised land to his nephew for life and the *ultimate* remainder "to such person or persons as

were to "persons who are her closest relatives at her death as defined by Illinois law," Shelley's Rule would not apply in Illinois.

The Illinois court cited no authority at all for the notion that Shelley's Rule could apply when "persons" and not "heirs" were the specified direct object of the devise or grant of the remainder. It did stress that Shelley's Rule is intent-defeating so that it "cannot be evaded however distinctly the intention to evade it appears."²⁸⁴ One has the idea the judges were thinking of Shelley's Rule as a sort of game. The conveyor was attempting an "end around" but was not doing it the way the court considered most proper (for example, remainder to children per stirpes, and if none to ascendants, then collaterals, without the words "descent" or "heirs" ever appearing). Therefore the court would extend the scope of Shelley's Rule to frustrate attempts to avoid it.

In a Pennsylvania case, the testatrix was more careful in drafting the clause she apparently thought would take the remainder out of Shelley's Rule.²⁸⁵ The devise was to the life tenant with a further devise at her death to "such person or persons and in such shares, and for such estates and interests therein, to whom and as the same would go had she died seized thereof in fee and possessed of the said trust estates . . . agreeably to the then existing intestate laws of the state of Pennsylvania."²⁸⁶

Shelley's Rule was nevertheless applied, the court stating that "it is immaterial in the will whether he [a testator] describes the line of descent by a word of art [heirs] or a periphrasis, meaning the same thing."²⁸⁷ Of course it was highly material when Shelley's Rule was created that the term "heirs" appear. The Pennsylvania court gave no reason why an intent-defeating rule should be expanded by eliminating one of its key requirements.²⁸⁸

would, under the laws of the state of Maryland, inherit the same as the *heirs* of my said nephew if he had died intestate seized in fee thereof." *Id.* at 406 (emphasis added).

284 *Emery*, 145 N.E. at 350.

285 *William's Appeals*, 83 Pa. 377 (1877).

286 *Id.* at 385. Note the word "heirs" is never used, the verb is "go" and not "descend," and the statute is not referred to as a succession or heirship statute but as an "intestate" law.

287 *Id.* at 391. A case cited for this point, *Yarnall's Appeal*, 70 Pa. 335 (1872), did support the conclusion. See discussion in *infra* note 288.

288 Pennsylvania had abandoned the common law requirement that the word "heirs" appear in a deed in order to create a fee estate many years before the decision in *William's*. Thus the Rule stated there in the case of a will—that *Shelley* could create a fee simple estate without the word "heirs" appearing in the instrument—was not one the court was *incapable* of applying to deeds.

"Persons" is by no means the only word that can substitute for "heirs" under the majority rule expanding the scope of Shelley's Rule. Several courts have treated a remainder to "issue"²⁸⁹ or even "de-

The early cases in Pennsylvania developing the notion that "heirs" is not essential for application of Shelley's Rule are collected in *Yarnall's Appeal*, 70 Pa. 335 (1872), where the remainder was to the "person or persons" who would inherit from the life tenant, daughter of testatrix, if she had survived her husband. Shelley's Rule was applied even though by the terms of the instrument the life tenant's husband was eliminated as a potential heir so that the class of "persons" to whom the remainder was conveyed was not coextensive with the life tenant's "heirs." *Id.* At the time of the effective date of the instrument in *Yarnall*, a Pennsylvania husband was his wife's heir if she was not survived by any issue, parent, sibling, niece or nephew or their descendants, or brothers and sisters of the half blood or their issue. 1833 Pa. Laws 143. The decision is wrong. See *supra* text preceding note 87.

289 *E.g.*, *Kleppner v. Lavery*, 70 Pa. 70 (1871) (fee tail became fee simple absolute); *Allen v. Markle*, 36 Pa. 117 (1859); *Stokes v. Van Wyck*, 3 S.E. 387 (Va. 1887) (life tenant took fee tail, converted by statute abolishing fee tail into fee simple determinable upon definite failure of issue).

The history in Pennsylvania of treatment of a remainder to the life tenant's "issue" is instructive. In the first such case, *Jame's Claim*, 1 Dall. 47 (Pa. 1780), the court, citing no authority at all, declared it was of the "opinion" that issue was a word of limitation. *Id.* at 48.

In the next case, *Paxson v. Lefferts*, 3 Rawle 59 (Pa. 1831), the court conceded that "issue" was not always a word of limitation, yet it held that "issue" was a word of limitation in the instrument under consideration, even though the remainder was to the life tenant's "issue" and "their heirs." *Id.* at 75. The court declared that superadded words of inheritance did not necessarily make "issue" a word of purchase. The court cited the English treatise, CHARLES FEARNE, AN ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES 181 (6th ed. 1809), for this vague notion. Fearne, in turn, cited *Dodson v. Grew*, 95 Eng. Rep. 835 (C.P. 1767), where the remainder following a devise to testator's nephew was to "the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male." *Paxson*, 3 Rawle at 76. Although this is the equivalent of "to his issue and their heirs," the Chief Justice found the conveyor intended to create a fee tail male and applied Shelley's Rule for this reason. That is, because the remainder was to "issue" and not "heirs," Shelley's Rule operated as a rule of construction, not of law. See *infra* notes 293-94 and accompanying text. Two of the four justices that decided *Dodson* concurred on the theory that "issue" was a word of limitation. If they meant to say it always is such, their views were inconsistent with that of the Pennsylvania court in *Paxson*. Under the lead opinion in *Dodson*, the conveyor's adding words of inheritance to the remainder to "issue" of the life tenant showed they were to take as purchasers, unless a fee tail was actually intended (rather than the result of applying Shelley's Rule).

Today, except in Delaware, see *infra* note 359, common law fees tail are not recognized. See RESTATEMENT OF PROPERTY ch. 5, Introductory Note (1936) (three other states by statute recognize fee tail for one generation only); SIMES & SMITH, *supra* note 1, § 62. Accordingly, outside Delaware, a remainder to the life tenant's "issue and their heirs" should preclude application of Shelley's Rule.

scendants"²⁹⁰ as equivalent to "heirs of the body" of the life tenant, thereby giving that person a fee tail under Shelley's Rule, often upgraded by state statute into a fee simple. In this type of case, however, as with remainder to "persons" who would inherit,²⁹¹ *Shelley* operates as a limited²⁹² rule of construction and not of law, so that, if the con-

290 See *Turner v. Monteiro*, 103 S.E. 572 (Va. 1920) (holding that words of inheritance are no longer required to apply Shelley's Rule).

Smith v. Wright, 779 S.W.2d 177 (Ark. 1989), said a remainder to the life tenant's "descendants" was equivalent to one to "heirs of the body." In an alternative holding, the court declined to apply Shelley's Rule on the theory that the bodily heirs were to be determined at a time subsequent to the life tenant's death, that is at the termination of the trust at issue, which was to continue for several years after such death. Thus "descendants" was not the equivalent to "heirs of the body" in the technical sense.

The court was wrong concerning the time when heirship was to be determined. The remainderpersons under the will were initially determined at the life tenant's death. Under the clear terms of the instrument, upon the death of life-tenant Buren, the trust involved was to continue, and Buren's income interest to be paid to his widow and "descendants." When the trust later terminated, the real estate in the trust corpus would be owned "by the survivors, or survivor, of the widow and the legitimate descendants, or descendants, of said Buren living at the time fixed for expiration" of the trust. *Id.* at 179. If the remainder was viewed as to bodily heirs and also as equitable, like Buren's life estate, Shelley's Rule would apply if the flow of income interest after Buren's death and the ultimate fee interest were considered a single interest. That is, on Buren's death, a surviving child of his took a vested interest in corpus, subject to a postponed right of possession and control, but not postponed enjoyment of the income, limited by a condition subsequent that would divest such child of all interest if he or she died before termination of the trust. As explained in *infra* text accompanying notes 342-43, *Shelley* applies not only when the remainder clause purports to vest a fee simple absolute in the remainderperson, but also when language in the remainder clause can provide for defeasance of the interest granted; in which case Shelley's Rule creates a fee simple defeasible rather than a fee simple absolute in the life tenant.

On the other hand, if the child's right to receive income until the trust terminated was viewed as an interest distinct from the interest in corpus (which was itself an equitable interest so there was a potential application of Shelley's Rule, see *supra* text accompanying note 39), Shelley's Rule would not apply. But not for the reason stated by the court—that heirship was determined subsequent to life tenant Buren's death. Rather, non-applicability would be due to the fact that the class taking an interest in corpus at termination of the trust did not include all of Buren's bodily heirs. For example, a child who survived Buren but died before termination of the trust would be outside the class of ultimate remainderpersons. Heirs who survive to a date after the ancestor's death do not constitute the same class as technical heirs.

291 See *Earnhart v. Earnhart*, 26 N.E. 895 (Ind. 1891), discussed in *supra* text accompanying note 275.

292 The pertinent cases seem to look to all parts of the instrument except for the words "for his life" following the naming of the life tenant to ascertain if the "issue" or "persons" are intended to take a remainder as purchasers. As a "pure" rule of con-

veyor adds language to the effect that the "persons" or "issue" shall take as purchasers the desired remainder interest will be recognized.²⁹³ Such intent appears if the remainder is to persons or issue "and their heirs" or "in fee simple." The most direct way to express the intent is illustrated by a 1914 Pennsylvania case which refused to apply Shelley's Rule where the gift over after a devise of a life estate was "to his [the life tenant's] descendants who shall be then living, *who shall take the same in remainder . . . as they would have taken . . . had he then died actually seised and possessed*" of the land.²⁹⁴

struction Shelley's Rule could not exist, as the "for life" in the clause before the remainder clause should be conclusive that the person to hold for life only is not to have a fee estate, an intent to be implemented by treating the gift over as creating a remainder.

293 See SIMES & SMITH, *supra* note 1, § 1548 at 443.

Note, *supra* note 2, at 1015 n.9, says that *Zane v. Weintz*, 55 A. 641 (N.J. Ch. 1903), treated Shelley as a rule of construction. The remainder there was conveyed to "persons" who would succeed to the estate if the life tenant owned it in fee. Dictum in *Zane* supports this understanding of it. Six years later, a New Jersey court in *Peer v. Hennion*, 76 A. 1084 (N.J. 1909), discussed in *supra* note 275, can be read to say that in New Jersey when the remainder is to "persons"—or other non-technical terms are used to describe this class—there is a presumption that they are words of purchase rather than limitation. This would effectively eliminate application of Shelley's Rule, as a conveyor almost never intends it to apply. More recently, *Mazzola v. Malley*, 68 A.2d 655 (N.J. Super Ct. Ch. Div. 1949), seems to adopt a flat rule that Shelley can never apply unless the remainder is to "heirs" or "heirs of the body" of the life tenant. The remainder there was conveyed "to such persons or persons as would by law inherit the same [land] if he [the life tenant] had an estate in fee simple" in the property. *Id.* at 656.

294 *Lea v. Swanson*, 91 A. 611, 612 (Pa. 1914) (emphasis added). The court said a non-technical term such as "descendants" "'yields readily to a context indicating its use as a word of purchase.'" *Id.* (quoting *Stout v. Good*, 91 A. 613 (Pa. 1914)). Erroneously, the court said that the italicized words above, as mere words of distribution, were insufficient to show the intent that "descendants" was a word of purchase, not of limitation. The court failed to realize that the rule that words of distribution following remainder to "heirs" (the technical term) do not negate applicability of Shelley's Rule and had no application when use of "descendants" rather than "heirs" converted Shelley into a rule of construction rather than of law. The court did say that the words "then living" showed the testator's intent that the descendants were to take as purchasers on the theory that "then living" excluded subsequent generations of yet to be born descendants who would be inheriting if a fee tail were intended. But "persons who would inherit if the life tenant died owning the property in fee" also has a then-living requirement built into it, and Pennsylvania has applied Shelley's Rule to such a case. See *William's Appeal*, 83 Pa. 377 (1877), discussed in *supra* notes 285–86. *Lea* simply erred in holding that the words "then living" were, in a situation where Shelley was converted into a rule of construction, necessary to explain the clause "who shall take the same in remainder."

Secondary sources embrace—without analysis—the line of cases that extends Shelley's Rule to remainders to "persons," "issue," and "descendants," dispensing with the historical requirement of words of inheritance.²⁹⁵ This majority rule is, however, unsound for at least two reasons. First, it is contrary to the policies that should direct development of common law rules to extend an intent-defeating rule beyond its original scope, especially when the reason for the Rule—forcing the payment of feudal "dues" owed by persons who take by succession—has long since disappeared. Second, if a court adhered to the maxim of construction that an instrument is initially to be construed as if the Rule in Shelley's Case did not exist²⁹⁶ it would have absolutely no reason to convert "persons who would inherit" into "heirs" or "issue" into "heirs of the body." If there were no Shelley's Rule, surely the court would accept the language deliberately chosen by the conveyor. The refusal to do so seems to be a reaction to what the courts must view as an attempt to avoid Shelley's Rule by the conveyor, although, of course, the conveyor has a right to avoid it.²⁹⁷ The minority is correct; Shelley's Rule should never apply unless "heirs" (general or bodily) is the direct object of the grant or devise of the remainder.

295 See RESTATEMENT (SECOND) OF PROPERTY § 30.1 cmts. f, g (1988), (with the qualification, applicable only to South Carolina deeds today, that "heirs" must appear if, wholly apart from Shelley's Rule, the jurisdiction requires that word to create a fee estate); RESTATEMENT OF PROPERTY § 312, cmts. f, g (1940) (same qualification); see also Note, *supra* note 2, at 1014; Rhea, *supra* note 11, at 112.

296 See *supra* text accompanying notes 48–52.

297 SIMES & SMITH, *supra* note 1, state that the appropriate mode of avoidance is a conveyance to the would-be life tenant "for 100 years, should he live that long." *Id.* § 1572, at 490. This makes the particular estate a leasehold, not a freehold, and for this technical reason, Shelley's Rule (hopefully) does not apply and the future interest conveyed to the heirs of the "lessee" will be recognized. But see *Seeger v. Leakin*, 25 A. 863, 863 (Md. 1893) (grant of leasehold to daughter during her natural life and to her bodily heirs if she shall have any; court held that where personal estate "including of course terms of years or whatever duration" is bequeathed in terms which would vest an estate tail in real estate, Shelley's Rule vests an estate tail in the subject of the personal estate as well); *Hughes v. Nicklas*, 17 A. 398, 398–99 (Md. 1889) (devise of leasehold to Jane "with remainder over to her heirs of her body if she should have any;" court held Shelley's Rule applies to the leasehold as it would to a freehold).

VII. SHELLEY'S RULE HAS ALSO BEEN MISAPPLIED IN CASES
INVOLVING TERMINABLE LIFE ESTATES

A. *The Rule Has No Application Where the Instrument Conveys a
Remainder to "Heirs" but Provides a Nontechnical Definition for "Heirs"*

The previous sections of this Article have dealt with the question whether an adjective or choice of law clause directly modifying "heirs" of the life tenant, the intended remainderpersons, qualified "heirs" so as to require a conclusion that it was not used in its technical sense. But phrases other than such modifying adjectives and choice of law provisions may also qualify "heirs" in such manner. Occasionally, the conveyor specifically defines "heirs" in a restrictive sense. An example from New Mexico is a deed to a grantor's daughter for life, then to "her heir or heirs, meaning her children if she have any at her death."²⁹⁸ Similarly, a North Carolina deed provided that on the life tenant's death, the granted land would belong "to her heirs, the children of the said Isaiah," her husband.²⁹⁹

In most cases the argument that the conveyor intended to use the term "heirs" in a restricted and nontechnical sense is not so easily established. The party seeking to avoid Shelley's Rule on this basis must rebut the presumption that "heirs"—a technical term of art—is used in its technical sense. As has been shown, the caselaw generally demands "clear" or "plain" evidence in the instrument of the conveyor's intention that the word have a nontechnical meaning.³⁰⁰ Apparently the presumption stands if the court is of the view that more likely than not the conveyor intended a nontechnical meaning for "heirs," yet this is not clearly established.

298 *Abo Petroleum Corp. v. Amstutz*, 600 P.2d 278, 279 (N.M. 1979); see also RESTATEMENT OF PROPERTY § 305 cmt. s (1940). In *Prior v. Quackenbush*, 29 Ind. 475 (1868), the body of the deed referred to grantee Catherine and made a typical reference to "her heirs." Inserted just above the grantor's signature was a "nota bene" to the effect that the intent was to give Catherine only a life estate and that "Elizabeth Stewart and Louisa Stewart . . . are the only heirs contemplated in the foregoing deed." *Id.* at 476. Shelley's Rule was held inapplicable to defeat the stated intent that Catherine was to take only a life estate, because of this restricted definition of "heirs." See also *Gardner v. Dillard*, 258 S.W.2d 93 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.), discussed in *supra* note 84.

In *Hall v. Gradwohl*, 77 A. 480, 483 (Md. 1910), the remainder clause called for equal division among the life tenant's "children or legal heirs." The court concluded that the life tenant's children acquired a remainder as purchasers.

299 *Hodges v. Fleetwood*, 9 S.E. 640, 640 (N.C. 1889); see also *Pryor v. Duncan*, 47 Va. (6 Gratt.) 27 (1849) (defining in the context of the instrument "heirs" as "children").

300 See *supra* text accompanying notes 62–65.

In an Indiana case³⁰¹ the testatrix devised land to a daughter for life, then "to her lawful heirs." Another passage of the will left some household effects to "my said two heirs," referring to the daughter and her brother, the testatrix's son. To avoid application of Shelley's Rule, it was urged that this bequest showed that the conveyer used the word "heir" to mean "child." The court rejected this argument for lack of a "clear intention"³⁰² of the testatrix that her nontechnical use of "heirs" in the bequest of household items carried over to the devise of land in a different portion of the will.³⁰³

B. A Nontechnical Definition Is Inferred from a Gift Over to One Who Could Be an Heir of the Life Tenant

On the other hand, the presumption that "heirs" is used in its technical sense has been held rebutted in almost every case³⁰⁴ where the instrument provided that if the life tenant died without heirs the estate should pass to a person or persons who could have been the life tenant's heir(s). Perhaps the strongest of these cases involved a deed granting a life estate to the grantor's daughter Sarah, with remainder "to such heir or heirs as she hereafter may have. But in the event of the death of the said Sarah Eliza Butler, and in the event of her leaving no lawful issue," to the heirs of Sarah's father.³⁰⁵ That latter

301 Perkins v. McConnell, 36 N.E. 121 (Ind. 1894).

302 *Id.* at 122.

303 A contrary result was reached in an Ohio case I find indistinguishable, *Bunnell v. Evans*, 26 Ohio St. 409, 410 (1875), where the will gave a remainder to the life tenant's "heirs." In another part of the will specific devises and bequests were made to named children of the testator, coupled with a directive that the "above-mentioned heirs shall bring in an account." The Ohio court was willing to extend the nontechnical meaning of "heir" as "child" in the clause concerning an action to account to the remainder provision in another part of the will.

Rowe v. Moore, 72 S.E. 468 (S.C. 1911), involved a devise to a daughter for life, then to "the heirs of her body." Shelley's Rule was not applied to create a fee tail in the daughter on the ground that "heirs of the body" actually meant "children." This was based on a clause of the will devising property to testator's son for life, "then to the heirs of his body forever, the child or children of one of his children dead, to take the share of his or their parent." *Id.* at 469. The court explained that "heirs of the body" in the technical sense of this phrase would by itself result—if Shelley's Rule did not create a fee tail—in a per stirpes distribution to grandchildren, yet the conveyer felt the need to spell that out.

304 One contra decision is *King v. Johnson*, 83 S.E. 1070 (Va. 1915). There a gift over to the life tenant's brother in the event the heirs of the life tenant did not take the remainder was held not to "plainly show" that the word "heirs" was not used in its technical sense in the remainder clause. *Id.* at 1072. The only other contra decision I found, from Illinois, seems to have been overruled sub silentio. See *infra* note 311.

305 Duckett v. Butler, 45 S.E. 137, 137 (S.C. 1903).

group consisted of relatives who would have been the life tenant's collateral heirs, indicating that the "heirs" of Sarah who were granted the remainder consisted of a group not as broad as her heirs general. But there were two additional bases for rebutting the technical-use presumption. The first involved the use of the words "may hereinafter have." At the time of delivery Sarah did have ascendants and collaterals living who could be her heirs, but no children. Second, the word "issue" in the deed can be viewed as defining "heirs."³⁰⁶

In most states, however, the two additional factors would not have been necessary to overcome the presumption of technical use of "heirs." The gift over to a potential heir itself suffices. Several such decisions are found in North Carolina caselaw. Shelley's Rule was held inapplicable in a 1939 case of a devise "to my nephew W. C. Edwards for his lifetime, and to his heirs if he dies without heirs, my property goes to my Bro. R. C. Edwards" and then to two named children of a nephew of the testatrix.³⁰⁷ The three devisees of the gift over were potential collateral heirs of the life tenant, and this was sufficient to establish that the "heirs" of W. C. Edwards were not his heirs in the technical sense, but a restricted group.³⁰⁸ For the same reason Shelley's Rule was held inapplicable in a 1949 North Carolina case where the devise was to testator's son for life then to his lawful heirs, but if he die without lawful heirs to his sister.³⁰⁹

306 The Court declined to construe "heirs" as "heirs of the body"—a possible interpretation—in order to apply Shelley's Rule so that Sarah would take a fee tail. Rather, the court found "heirs" meant children, primarily basing its conclusion on the language "as she may hereinafter have." *Id.* at 138.

307 *Edwards v. Faulkner*, 2 S.E.2d 703, 704 (N.C. 1939); accord *RESTATEMENT OF PROPERTY* § 305 cmt. r (1940) (to B for life then to B's heirs, and if he leave no heirs to his brothers and sisters); *Note, supra* note 2, at 1097.

308 North Carolina has never implied in this situation that the actual intent was to use the term "heirs of the body"—which would be consistent with collaterals of the life tenant taking a gift over—so that Shelley's Rule would apply to create a fee tail in the named life tenant, upgraded by statute in North Carolina to a fee simple. See *supra* note 149.

But see *Patrick v. Morehead*, 85 N.C. 62, 67 (1881). The devise was to testator's grandson for life, then to his heirs, or such of his heirs to whom he should appoint; but if he die without lawful issue, to all of testator's male grandchildren. In dictum the court said that but for the power of appointment, which restricted the class of heirs to those the life tenant might select, Shelley's Rule would have created a fee tail in the life tenant, converted by statute into a fee simple.

309 *Tynch v. Briggs*, 54 S.E.2d 918, 918 (N.C. Ct. App. 1949); accord *White v. Lackey*, 253 S.E.2d 13 (N.C. 1979). The most recent such North Carolina case is *Taylor v. Honeycutt*, 81 S.E.2d 203 (N.C. 1954), involving a devise to testator's daughter, with a substitutional gift to his son if she died without "heirs." It was assumed there was an implied remainder in such a situation to such "heirs," but Shelley's Rule

In an Illinois case the life tenant was testator's daughter, and the gift over in the event of failure of her issue—which cut out her "heirs" as remainderpersons—was to "my [testator's] other heirs."³¹⁰ The court held that the word "heirs" had not been used in the technical sense. "[Testator] could not have intended to limit a remainder to the heirs general of the complainant and then take it from them in default of a particular class of heirs. His intention was to limit the remainder to the heirs of the body of the complainant"³¹¹

Other states that have recognized that "heirs" cannot mean heirs in the technical sense in light of a substitutional gift over to one or more persons who could be in the class of heirs general of the life

did not apply because the gift over showed testator, in referring to his daughter's "heirs," had not used that word in its technical sense. See also *Hampton v. Griggs*, 113 S.E. 501 (N.C. 1922) (construing gift over to "the family" to include the life tenant's collateral heirs); *May v. Lewis*, 43 S.E. 550 (N.C. 1903) (gift over to life tenant's "next of kin").

310 *Winchell v. Winchell*, 102 N.E. 823, 824 (Ill. 1913).

311 *Id.* Because the Illinois Court, unlike North Carolina in cases discussed above, construed "heirs" of the daughter to be "heirs of her body," Shelley's Rule did apply. It gave her a fee tail, but an Illinois statute cut it down to a life estate with remainder in fee simple absolute to her heirs. 1871-72 Ill. Laws 282, now 765 ILL. COMP. STAT. ANN. 5/6 (West 1993).

Winchell seems necessarily to overrule sub silentio *Silva v. Hopkinson*, 41 N.E. 1013 (Ill. 1895), which could not have been distinguished had it been considered by the *Winchell* court. There the testator devised life estates to two daughters with remainder to their heirs. Should either daughter die without issue, a gift over to the other daughter would take effect. It was urged that in the remainder clause "heirs" could not mean heirs general, as the sister of each life tenant was a potential heir, yet was provided for in a gift over. The court held that the gift over "falls far short of making it clear that the testator used the word 'heirs' in other than their [sic] legal sense." *Id.* at 1014. This passage was quoted favorably in *Hege v. Provident Mut. Life Ins. Co.*, 173 N.E. 610, 613 (Ill. 1930), a case where there was ample reason, not present in *Silva*, for rejecting the notion that "heirs" meant "children" or something less than heirs generally.

tenant are New Hampshire,³¹² Ohio,³¹³ Pennsylvania,³¹⁴ Texas,³¹⁵ and Wyoming.³¹⁶

312 *Crockett v. Robinson*, 46 N.H. 454 (1866), concerned a devise of life estates to two sons of the testator, with remainder to the heirs of each, with a gift over if either died without heirs to named nephews and nieces of the testator. As these could have been collateral heirs of either life tenant, the court held "heirs" meant "heirs of the body." Shelley's Rule created a fee tail, but that was upgraded by statute to a fee simple.

313 *King v. Beck*, 15 Ohio 559 (1846). Testator devised a life estate to his brother, remainder to brother's heirs, but if there be no legal heirs, to two named children of a sister of the testator and life tenant. The court held "heirs" meant children (rather than heirs of the body, a possible construction), and thus Shelley's Rule did not apply at all.

314 *Bassett v. Hawk*, 11 A. 802 (Pa. 1888) (testator's son was life tenant with gift over to testator's grandchildren; "heirs" construed as heirs of the body, so Shelley's Rule created a fee tail).

315 In *Hunting v. Jones*, 215 S.W. 959 (Tex. Comm'n App. 1919), *modified*, 221 S.W. 265 (Tex. Comm'n App. 1920), the remainder following a devise to Testator's daughter for life was "to her bodily heirs equally," and the remainder after a devise to a son for life was "to his heirs by his present wife." If Shelley's Rule applied to the second devise the son would have obtained a fee tail special at common law. But the court held that in each quoted remainder clause the word "heirs" meant children. *Id.* at 962. This was based on a gift over "to my [Testator's] other heirs," if either life tenant were to "die without heirs." Testator had a third child that the court noted must be one of the "other heirs."

316 The holding in *Crawford v. Barber*, 385 P.2d 655 (Wyo. 1963), was probably an erroneous decision. The devise was to testatrix's son David for life then at his death unto the heirs of his body who may be living at that time. If any of his heirs shall have died before his death, then the share of said heir shall go to the children of said heir. If said heir shall have died without children, then said share shall be divided among the other heirs of the said David W. Crawford. If the said David W. Crawford shall die without any children surviving him, then it is my will that his [share of the devise] shall be divided among his heirs

Id. at 656 (emphasis added).

David died without issue, so the remainder clause of concern was the ultimate one. The court correctly held that because of the gifts over, the initial references to "heirs of his body" and "heirs" meant children and not issue. From this the court leaped to the conclusion that the italicized word was also not used in its technical sense. Yet it cannot mean "children" in context because the condition that grants the estate to these heirs is the absence of children. In context it seems clear that the conveyer's intent is well served by defining the italicized "heirs" in its technical sense. On the other hand, had testatrix written instead of just the italicized "heirs" the term "heirs other than issue"—which also is what she meant—Shelley's Rule arguably would not have applied. But see *Hardage v. Stroope*, 24 S.W. 490 (Ark. 1893), applying Shelley's Rule where the remainder was to the life tenant's bodily heirs, but if she leave none, to her statutory heirs. Did the conveyer here mean "heirs other than descendants"?

C. *The Inference of Nontechnical Use Is Strong in Cases of a Determinable Life Estate With Remainder to the Life Tenant's Heirs*

Oddly, in a different type of case where the argument for the conveyor's having a nontechnical meaning for "heirs" seems as strong as in most of the decisions discussed above, most courts have been unwilling to draw the inference, with the result that Shelley's Rule has again been applied dubiously. This class of cases involves a terminable life estate, to which Shelley's Rule can be applicable.³¹⁷

The leading case is *Lydick v. Tate* from Illinois.³¹⁸ It involved a devise to testator's daughter Ellen "during her widowhood . . . to have and to hold for and during her natural life, and at her death or remarriage the said land shall descend to her heirs."³¹⁹ It was urged that "heirs" here meant children (Ellen had three when the will was written). The court held:

The word "heirs" is a technical word with a fixed legal meaning, and, when used in a will, unless controlled by, or inconsistent with the context, must be interpreted according to its strict technical meaning A careful examination of the entire will fails to disclose a single word or expression which even tends to indicate the testator used the word "heirs" in any other than its technical sense.³²⁰

The other state to have clearly³²¹ rendered such a holding is, not surprisingly, North Carolina. In *Ham v. Ham*, the remainder to heirs

Note that a remainder "to his issue but if he leave none to his ascendant and collateral heirs" is not technically the same as "to his heirs," even if the heirship statutes in effect when the will or deed took effect allowed ascendants and collaterals to take only if the intestate leaves no issue. Disregarding a surviving spouse (who is likely to be heir along with issue), the heirship statute in force at the life tenant's death could admit parents, but not collaterals, to shared heirship when the intestate left grandchildren but no children and no spouse. Likewise if the intestate left no issue, the statute could prefer parents to the exclusion of any collateral heir, especially those more remote than relatives in the parents' parentela of collaterals.

317 See 1 AMERICAN LAW, *supra* note 6, § 4.42. The *Restatement of Property* gives two examples: (1) A to B during her widowhood, then to B's heirs; (2) A to B for the life of C, then to B's heirs. RESTATEMENT OF PROPERTY § 312 cmt a, illus. 3 & 4 (1940). A better example than (1) above for applying Shelley's Rule to a determinable life estate—because it eliminates the argument that "heirs" is not used in its technical sense—would be a conveyance to A during her widowhood, and if she remarry to her children, but if she die never having remarried, to her heirs.

318 44 N.E.2d 583 (Ill. 1942).

319 *Id.* at 587.

320 *Id.* at 592.

321 In *Hiester v. Yerger*, 31 A. 122 (Pa. 1895), the grantee was devised land for "his natural life, upon condition he keep the same in good repair and insured, and also pay all the taxes thereon during said term; and after his decease . . . unto his then

followed a life estate to testator's daughter "during her lifetime or widowhood."³²² Shelley's Rule was applied without discussion of the problem that upon the life tenant's remarriage she would have no heirs to take the estate but could have children or issue at that time, which is what the deviser may have meant by "heirs."³²³

The one contrary holding is from Indiana, *Conger v. Lowe*,³²⁴ where Samuel was devised a life estate in land, followed by this future interest clause: "At his death, or his refusal to live on or occupy the same [land], then . . . to the said Samuel M. Conger's lawful heirs." Shelley's Rule was held inapplicable. To the Indiana court it was

surviving heirs" *Id.* at 122 (emphasis added). No provision was made for who would own the estate if the life tenant could forfeit his interest for failure to pay taxes or make needed repairs. The court applied Shelley's Rule, holding the grantee took a fee simple, without specifying whether it was absolute or defeasible. However, since the issue being litigated was whether the party named as grantee had marketable title, and the court held he did, the fee must have been absolute. Thus the court necessarily held by implication either (1) that the "condition" about repairs and taxes was precatory or (2) the conveyer intended to devise a determinable life estate but when Shelley's Rule was applied, the condition for determination did not attach to the resulting fee to make it defeasible. See *infra* text accompanying notes 344-64.

If the condition clause was not precatory, *Hiester* is factually similar to *Lydick*. Where the issue is whether a named remainderman is entitled to take when a life estate is terminated prematurely, after a court's ruling that the life tenant must forfeit it for waste, words like those emphasized above (and "at his death") are construed as "and when the life estate ends" so that the party named as remainderman can take when the life tenant's death is not the cause of termination of the life estate. See *Kost v. Foster*, 94 N.E.2d 302 (Ill. 1950); *SIMES & SMITH*, *supra* note 1, § 144. Thus, if the condition clause was not precatory, *Hiester* failed to give a nontechnical meaning to "heirs"—such as "issue"—that would have provided a likely taker upon early determining of the determinable life estate. Because the instrument is supposed to be construed as if Shelley's Rule did not exist, see *supra* text accompanying notes 48-52, on this view the *Hiester* court improperly failed to consider the maxim favoring a construction that avoids partial intestacy or incomplete disposition. See *supra* text accompanying notes 77-81.

322 *Ham v. Ham*, 21 N.C. 464, 464 (1837).

323 In *Pryor v. Duncan*, 47 Va. (6 Gratt.) 27 (1849), the testator understood that the life tenant's bodily heirs, the named remainderpersons, would be unable to qualify as heirs to take the estate if the life estate were to determine prematurely on the stated condition that the life tenant not conceal the property (slaves). The determination clause provided that if concealment were to occur, "her [the life tenant's] title to cease, and [I] direct my executors to take them [the slaves] into possession . . . and their increase to be divided among her children if any living, otherwise to be divided among my [testator's] children." *Id.* at 27. Counsel argued that the quoted provision showed that "bodily heirs" in the remainder clause applicable if the life estate ended upon the life tenant's death must have meant "children." Apparently the court accepted this less than logical argument, for it declined to apply Shelley's Rule.

324 24 N.E. 889, 889 (Ind. 1890).

clearly apparent that the testator contemplated that the persons designated as "lawful heirs" should be persons in being before the death of Samuel M. Conger, because not only the title, but the possession, of the estate in remainder over was to vest in them by the terms of the will, as well upon the failure or refusal of [Samuel] to occupy the farm as upon his death.³²⁵

Thus it was "absolutely certain that the testator did not use the phrase for the purpose of designating the whole class" of heirs in the word's technical sense.³²⁶ The *Conger* court held "heirs" here meant children of Samuel.

While the testator's intention in the Indiana case surely is not so absolutely certain, the result there seems more reasonable than that in *Lydick* or *Ham*. It is bolstered by a factor not mentioned by the Indiana court: that the canon of construction presuming the conveyor uses a technical term like "heirs" in its technical sense seems to be neutralized by applicability of the canon favoring a construction that makes a complete disposition³²⁷ (often encountered in the form of the presumption against partial intestacy).³²⁸

It has been said that, where two applicable canons of construction lead to conflicting interpretations of an instrument, a court must give each presumption "its proper weight."³²⁹ Many cases indicate that the presumption favoring the technical meaning of "heirs" is a weighty

325 *Id.* at 891.

326 *Id.*

327 That is, the devise or grant clause embraces every interest in the land at issue, with no interest retained in the conveyor or, if the instrument is a will, retained by his estate or passing to residuary devisees.

328 Compare *supra* text accompanying notes 61–65 with text accompanying notes 78–84. Neither in Illinois' *Lydick* nor Indiana's *Conger* case nor North Carolina's *Ham* case does the court indicate whether the will contained a residuary clause. If any of these wills did, the presumption of complete disposition as applied to deeds should apply by analogy. That is, the paragraph of the will describing the land and disposing of some interest in it is to be construed separately. Just as in the case of the deed, the law assumes the conveyor, in disposing of some interest[s] did not hold back an interest to pass, in the case of a deed, later at the conveyor's death (or subsequent pre-death deed), or in the case of a will, to pass later in the instrument's residuary clause. See discussion in *supra* notes 79–84 and accompanying text.

329 2 ROBERT T. DEVLIN, A TREATISE ON THE LAW OF DEEDS § 840 (1887). Thompson likewise says that in such a situation "the policies underlying the rules [of construction that are in conflict] need to be examined and weighed in the context of the particular facts of the case." 9 GEORGE W. THOMPSON, REAL PROPERTY § 82.13(e), at 426 (David A. Thomas ed., 1994); see also W.W. Allen, Annotation, *Conflict Between Granting and Habendum Clauses as to Estate Conveyed*, 58 A.L.R.2d 1374, 1413 (1958) (stating that conflicting maxims are to be "given such weight as in law and in reason they are entitled to"); 95 C.J.S. 2d *Wills* § 590, at 751 n.89 (1957) (stating that court "balances against each other" the conflicting maxims of construction).

maxim of construction in stating that it will prevail unless language of the instrument "clearly"³³⁰ or "plainly"³³¹ establishes that the conveyor intended a nontechnical meaning. One court has said the case for the non-technical meaning must be "very clear."³³² Another has stated that the technical meaning of "heirs" controls "unless qualified by other language which shows beyond a reasonable doubt that a different meaning be given."³³³

On the other hand the presumption that a conveyor intended "to make a complete disposition of all of her property" is "very strong"³³⁴ and is dispelled only if other language shows "clearly" that the conveyor intended to hold back some interest in the property.³³⁵ Apparently, then, there is no authority that could be cited—in order to support the holdings in *Lydick* and *Ham*—to the effect that the presumption of technical usage is stronger than the presumption against partial disposition. Some other basis for breaking the impasse is needed, such as subordinating the presumption favoring technical us-

330 *E.g.*, *Cook v. Sober*, 135 N.E. 60, 61 (Ill. 1922) (other language in instrument must make it "perfectly clear" term "heirs" not used in technical sense); *Perkins v. McConnell*, 36 N.E. 121, 122 (Ind. 1894) (context must manifest "clear intention" to have employed "heirs" as word of purchase, not of limitation); *McClen v. Lehker*, 123 N.E. 475, 478 (Ind. App. 1919) ("heirs" presumed to be used in technical sense unless contra intent "clearly and unequivocally" shown); *Fraser v. Chene*, 2 Mich. 81, 84 (1851) (requiring that language must "clearly" show "heirs" used in other than technical sense); *Stephens v. Clark*, 189 S.E. 191, 195 (N.C. 1937) ("heirs" accorded technical meaning unless different intent "clearly expressed"); *see also* *Beardsley v. Johnson*, 134 A. 530 (Conn. 1926) (decided after Shelley's Rule abolished—nothing "clearly indicate[d]" that "heirs" really meant "children"); *Cary*, *supra* note 66, at 379.

331 *See* *Clarke v. Smith*, 49 Md. 106, 120 (1878) (none of the circumstances relied on indicated "plain and unequivocal" intent of testator to use "*heirs lawfully begotten*" in sense of children rather than in technical sense); *Crockett v. Robinson*, 46 N.H. 454, 459 (1866) ("heirs at law" has technical meaning unless "plain" that other meaning intended); *Ham v. Ham*, 21 N.C. 464, 464 (1837); *Moore v. Brooks*, 53 Va. (12 Gratt.) 135, 140 (1855) (must "plainly" appear that the word "heirs" is being used in restricted sense); *Note, supra* note 2, at 1094 (where Shelley's Rule claimed not to apply, courts require instrument "plainly" show word "heirs" not used in technical sense).

332 *Quick's Ex'r v. Quick*, 21 N.J. Eq. 13, 17 (1870).

333 *Orme v. Northern Trust Co.*, 172 N.E.2d 413, 418 (Ill. App. Ct. 1961), *modified*, 183 N.E.2d 505 (Ill. 1962).

334 *Gilkey v. Chambers*, 207 S.W.2d 70, 73 (Tex. 1947); *see also* *Payene v. Barnes*, 638 S.W.2d 299, 303 (Mo. Ct. App. 1982) (presumption against partial intestacy is "strong"); *Swearingen v. Giles*, 565 S.W.2d 574, 575 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

335 *In re Paulsen's Estate*, 158 P.2d 186, 190 (Colo. 1945); *Shane v. Johnson*, 99 A. 2d 557, 558 (Del. Ch. 1953); *Estate of McGahee*, 550 So. 2d 83, 86 n.7 (Fla. Dist. Ct. App. 1989); *White v. Brown*, 559 S.W.2d 938, 940 (Tenn. 1977).

age upon proof that a layman rather than an attorney wrote the instrument.³³⁶

Baron Parke seemed to express the view that where canons of construction clash in such a manner the more specific or narrow rule prevails over the more general, or broader.³³⁷ In the case he was discussing the competing maxims of construction were that which would avoid a partial intestacy and that providing, where two passages of an instrument are repugnant, the second (in order of appearance on the page) prevails over the first.³³⁸ Parke apparently considered the latter presumption the more specific.

It is true that partial intestacies can arise in many ways, including wording involving no technical terms at all. Whether a technical term has its technical meaning probably arises as an issue more often when partial intestacy is not a possible outcome than when it is. Nevertheless, I cannot conclude that one of these maxims is more specific than the other.

In a situation such as *Lydick*, then, what can a court do but guess at the conveyer's intent? The notion of the Indiana court in *Conger*—that the conveyer envisions the same relatives taking the property when the life estate determines prematurely as when it ends upon the life tenant's death—strikes me as the better guess. If so, the majority of the American cases involving the possibility of applying Shelley's Rule to a determinable life estate have been wrongly decided.

Still another possibility is that in the *Lydick-Ham* situation the remainder to "heirs" is intended to mean not children or issue, but the life tenant's "heirs determined as if the life tenant had died at the termination of the life estate by remarriage as well as by her death." Under this view, if the life tenant's closest relative when she remarried

336 See *Gilkey v. Chambers*, 207 S.W.2d 70, 71-72 (Tex. 1947) (following *Federal Land Bank v. Little*, 107 S.W.2d 374, 377 (Tex. 1937)).

337 *Morrall v. Sutton*, 41 Eng. Rep. 735, 736 (Ch. 1845). Baron Parke, as chief judge of the Exchequer, and Chief Justice Coleridge of the Court of Common Pleas were asked to give advisory opinions to the Court of Chancery in this matter involving a devise to testator's daughter, "her executors, administrators and assigns . . . during the term of her natural life," *Id.*, the equivalent of a conveyance "in fee simple absolute for life." No remainderpersons were named. The maxim that the specific rule prevails over the more general is well established in cases where two statutes apply by their terms to the same fact situation and call for different results. See *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944); *Board of Supervisors v. Simpson*, 227 P.2d 14, 15 (Cal. 1951); *Andrianos v. Community Traction Co.*, 97 N.E.2d 549, 552 (Ohio 1951); 82 C.J.S. *Statutes* § 369 (1953).

338 In this country the presumption would have been not in favor of the second passage but that which conveyed the greater estate, see *RESTATEMENT OF PROPERTY* § 243 cmt. e (1940).

was a brother, because any issue of hers were yet to be born, the instrument provides someone to take possession. The presumption in favor of complete disposition is better served by this construction than by that adopted in *Conger v. Lowe* by the Indiana court (heirs means children). Does Shelley's Rule apply if this construction is adopted? It should if the verbal reformulation of the word heirs is "and to her heirs if the life estate ends by her death, but to her heirs determined as if she had died when she remarries if remarriage determines the life estate." The first clause here uses "heirs" in its technical sense. Perhaps, however, if the verbal reformulation adopted to express the conveyer's intent is that quoted in the first sentence of this paragraph, the word "heirs" is not used strictly in its technical sense, and Shelley's Rule would not apply.

D. Where The Life Estate Is Determinable, Applying Shelley's Rule Should Create a Fee Simple Defeasible, Not, as Has Been Held, a Fee Simple Absolute

Applying Shelley's Rule does not always convert a life estate into a fee simple absolute. We have seen the result can be a fee tail.³³⁹ The draftsman can refine the entailment language following "heirs of the body" so that application of Shelley's Rule yields a fee tail special. Example: *O* to *A* for life then to *A*'s bodily heirs by his present wife.³⁴⁰ In states where *De Donis Conditionalibus* has been rejected as part of the common law, language added to the remainder to the life tenant's heirs that would create a fee tail results, when Shelley's Rule is applied, in the would-be life tenant taking a fee simple conditional.³⁴¹

Although I could find no case on point and no discussion in any secondary source of the possibility, the logic of Shelley's Rule requires recognition of a fee simple defeasible if appropriate defeasance language is attached to the remainder to the life tenant's heirs. Example: to *A* for life, then to *A*'s heirs so long as no alcoholic beverage is sold on the premises. By force of Shelley's Rule, the entire remainder clause merges into the grant of the life estate to create a fee estate.³⁴² Stated differently, in the example above Shelley's Rule changes the words "for life then" to the word "and." Thus, application of Shelley's Rule should not destroy the possibility of reverter retained by the con-

339 See SIMES & SMITH, *supra* note 1; see also Note, *supra* note 2, at 1008.

340 RESTATEMENT (SECOND) OF PROPERTY § 30.1 cmt. g (1988). If the remainder were to "heirs male of the body" of the life tenant, a fee tail male would result upon application of Shelley's Rule. RESTATEMENT OF PROPERTY § 312 cmt. g (1940).

341 RESTATEMENT OF PROPERTY § 312 cmt. 1 (1940).

342 See 1 RICHARD PRESTON, AN ELEMENTARY TREATISE ON ESTATES 329-30 (1828).

veyor in such a situation if a literal interpretation is given to the instrument.³⁴³

In *Ham* the court declared that the life tenant obtained a fee simple absolute, even though the life estate, which merged with the remainder upon application of Shelley's Rule, was determinable.³⁴⁴ In *Lydick* this was strongly implied by the court.³⁴⁵ *Lydick* expressly de-

343 Likewise, the recognition of a fee simple defeasible upon application of Shelley's Rule would preserve an executory interest. Example: to A for life, then to A's heirs, but if an alcoholic beverage is sold on the premises within 21 years after the death of A and her issue living when this instrument takes effect, the title shall vest in B and his heirs.

344 In *Ham* the bequest was of two slaves. The person named in the will as life tenant, Caren Ham, had sold one of them and apparently was preparing to sell the other. Caren's children, asserting they were remainderpersons and that Caren had only a life estate, sought an equitable decree enjoining further sale of the property and requiring Caren to post bond to protect their interests in remainder. Although one cannot infer this with confidence from the report of the *Ham* decision, it seems likely Caren's children were arguing that "heirs" meant "children" or "issue," see *supra* note 278 (concerning North Carolina's refusal to apply Shelley's Rule when the remainder is to issue). Perhaps the children argued that Shelley's Rule applied only to real property. The *Ham* court held equitable relief would be improper because under Shelley's Rule, Caren had acquired "the absolute estate."

The 1940 *Restatement of Property* says that Shelley's Rule applies to a conveyance from A to B during her widowhood, then to B's heirs, to give B a fee simple absolute. *RESTATEMENT OF PROPERTY* § 312 cmt. a, illus. 3 (1940). Since this was published before *Lydick* was decided, the reliance must have been on *Ham*.

345 There the devise was to testator's daughter Ellen "during her widowhood." She was a widow when the will was written but had remarried before testator died. When she died she devised all her property to two sons, to the exclusion of issue of her first marriage, who were the plaintiffs seeking to quiet title. Their theory was that the life estate in Ellen failed because she was not a widow when the will took effect. The remainder was thus accelerated, and in the remainder clause "heirs" meant children. The trial court held the plaintiffs were entitled to no interest and dismissed their complaint. Rejecting the contention that "heirs" meant children, the Illinois Supreme Court affirmed. Since Ellen had already remarried, this event must either have terminated her interest before the will took effect or have been legally irrelevant. Since Ellen's devisees took a fee estate, Ellen must have held a fee.

Apparently plaintiffs did not make the argument that under Shelley's Rule the fee was determinable on Ellen's ceasing to be a widow, and that determination occurred at the moment Shelley's Rule operated on the will, because Ellen was not then a widow. The unmade argument also contends that a possibility of reverter was left in the testator's heirs (assuming there was no residuary clause in his will). Ellen was one of three surviving children of testator and per stirpes took one third of the property at issue. Since the testator intended Ellen to have only a determinable life estate, she should not inherit more. Her three children living when the will took effect (who included the plaintiffs' ancestors) thus took one third of the possibility of reverter.

Precedent would support this argument if the plaintiffs claimed through a clause in the will devising the possibility of reverter to testator's heirs or if testator's heirs

clared that the determinable nature of the life estate was simply to be disregarded in applying Shelley's Rule.³⁴⁶ This seems implicit in *Ham*.

Neither court considered the point that if the apparent remainder clause used "heirs" in the technical sense, the wills provided no one to take the fee if the life tenant's life estate was determined upon her remarriage. This meant that either the testators' heirs³⁴⁷ had a possibility of reverter to assert upon the life tenant's remarriage or the residuary devisees had an executory interest to become possessory in such event, unless such possibility of reverter or executory interest was destroyed when Shelley's Rule was applied.

In applying Shelley's Rule to a determinable life estate to create a fee simple absolute, both the Illinois and North Carolina supreme courts relied on the exhaustive English treatise, *Fearne on Contingent Remainders*³⁴⁸ and a 1666 English case, *Merrel v. Rumsey*.³⁴⁹ *Merrel* involved a conveyance to a husband, Edmund, and wife Dorothy "for their joint lives, the remainder to the heirs of the body of Dorothy by Edmund." There was a further future interest to Edmund's heirs general following a life estate in Dorothy should Edmund die before Dorothy, as did occur. The court applied Shelley's Rule to the *first* remainder, giving Dorothy a fee tail special. Her life estate was

were residuary legatees. See *Fisher v. Easton*, 132 N.E. 442, 443-44 (Ill. 1921). There is apparently no caselaw to support that Ellen should be excluded from intestate succession. See *Gray v. Shinn*, 127 N.E. 755, 758 (Ill. 1920) (life tenant inherited all of undisposed remainder).

346 *Lydick v. Tate*, 44 N.E.2d 583, 591 (Ill. 1942).

347 As noted in *supra* note 345, in *Lydick* the life tenant Ellen was one of three intestate heirs of the testator. If Shelley's Rule were viewed as creating a fee simple determinable on her remarriage, she would have taken a one third interest in the property in fee simple absolute because of the merger of her two interests. Her brother and sister would have shared a two thirds interest in the fee, which would never have vested in Ellen due to her not being a widow when the will took effect.

The life tenant Caren in *Ham* was one of "several" children of the testator, so the fractional interest in fee simple absolute she would have taken due to merger would have been smaller than the one third the life tenant would have taken in *Lydick* had application of Shelley's Rule created a fee simple determinable rather than a fee simple absolute.

In each case there is a possibility that there were residuary devisees named in the will, not including the life tenants, who then would have had no interest to merge with a fee simple determinable. The residuary devisees would have had executory interests.

348 *Lydick* relied on the fourth edition of *Fearne*. I examined *FEARNE*, *supra* note 289. *Ham* does not specify the edition of *Fearne* it cites.

349 83 Eng. Rep. 68 (K.B. 1666). *Lydick* did not itself cite this case nor *Fearne*, but rather cited *Bails v. Davis*, 89 N.E. 706 (Ill. 1909), which did cite these English sources. *Bails* did not involve a determinable life estate, so its discussion on Shelley's application in such a case was dictum.

merged into the fee upon Edmund's death, and, apparently, the second remainder to his heirs never became possessory because it was an alternative contingent remainder that could take effect only if the first remainder failed.³⁵⁰

Merrel does establish that *Shelley* can operate to create a fee estate when the named ancestor's life estate ends prematurely because of the death of a controlling autre vie.³⁵¹ This is all the *Fearne* treatise cites it for.³⁵² Because of merger principles, Dorothy had in effect a life estate pur autre vie (Edmund), should she survive him. The only interest possibly eliminated in the process was a remainder that was a second, alternative contingent remainder, which would become void when the first alternative contingent remainder became possessory. *Merrel* simply did not involve applying Shelley's Rule to eliminate a condition of determination that could still occur after the remainder became possessory, such as the remarriage condition for determination in *Lydick* and *Ham*. The future interest eliminated in *Merrel* could not have been preserved by styling the fee estate created as determinable upon occurrence of a condition that might occur after application of Shelley's Rule, which was necessarily deferred in *Merrel* until it was known whether the wife or husband would be the first to die. The death of Edmund, the event his heirs would invoke to claim an estate, then occurred triggering application of Shelley's Rule to vest a fee estate in Dorothy.

Merrel is distinguishable from *Lydick* and *Ham* in that applying Shelley's Rule in those cases to create a fee simple absolute rather than a fee simple defeasible destroyed future interests subject to a condition that could still occur after application of Shelley's Rule—remarriage of the party named as devisee of a determinable life estate. In both the American cases either there was as a matter of law a rever-

350 Perhaps the remainder to the husband's heirs was void ab initio as repugnant to the first-granted remainder to the wife's heirs. Because the joint life estate would end on the husband's death, the court may have thought the effect of the limitation, on the facts as they actually transpired was this: O to Mrs. A for life, and, if she survives her husband, to X, but if she survives her husband to Y.

A fee tail special (the estate the wife had after Shelley's Rule operated) is an estate that could support a contingent remainder. *SIMES & SMITH*, *supra* note 1, § 107. Hence the remainder in the husband's heirs was not destroyed for lack of a particular estate.

351 Because the words "bodily heirs" were of limitation and not of purchase under Shelley's Rule, it was irrelevant that Dorothy had no bodily heirs when Edmund died; Shelley's Rule could be applied.

352 *FEARNE*, *supra* note 289, at 30-34.

sionary interest in the devisor's heirs³⁵³ (including the life tenant) or an executory interest in the wills' residuary devisees.³⁵⁴ The holder of either such future interest should have been entitled to take the fee upon the life tenant's remarriage. In both *Lydick* and *Ham* a holding that Shelley's Rule created not a fee simple absolute but a fee simple defeasible upon the widow's remarriage would have properly recognized the existence of the reversionary or executory interests intended to take possession upon such remarriage.

The *Ham* court also cited the 1805 English case, *Curtis v. Price*,³⁵⁵ which does sustain recognition in both *Ham* and *Lydick* of a fee simple absolute rather than fee simple determinable (upon remarriage of the intended life tenant). *Curtis* concerned a trust for the benefit of a husband for life, then for his wife Eleanor "during the term of her natural life, if she continued sole and unmarried; and if she should happen to marry" her life estate would end, she would obtain a small annuity, and the trustees would apply the remainder of the income to named children of the spouses. If Eleanor's life estate were to end not by her remarriage, the estate was to pass to the "heirs of the body of Eleanor by her said husband . . ." ³⁵⁶ Having purported to disentail by fine a fee tail special owned by her (and somehow removing her interest from the trust), Eleanor, joined by her children, purported to convey a fee simple absolute. It was held that by application of Shelley's Rule she did have a nondefeasible fee tail special rather than a fee estate defeasible upon remarriage.³⁵⁷ After noting that Shelley's Rule applied when there was an estate of freehold in a grantee with a remainder in her heirs, the court said, "The [life] estate during widowhood is an estate of freehold; and the possibility, that it may terminate in the life of the widow, and before there can be an heir, is no objection" to applying *Shelley*.³⁵⁸

It is true that *Merrel* had established that the fact that the life estate was determinable was no bar ("objection") to application of Shelley's Rule, but nothing the *Curtis* court says explains why an unconditional fee tail rather than a fee tail determinable resulted.

353 In both *Lydick* and *Ham* the life tenant was not the sole heir, so the future interest retained by the devisor's estates would not merge into the defeasible fee Shelley's Rule should have created in the party devised a life estate determinable. See *supra* note 347.

354 See *supra* note 337.

355 33 Eng. Rep. 35 (Ch. 1805).

356 *Id.*

357 At common law a fee tail could be made defeasible by a special limitation or a condition subsequent. SIMES & SMITH, *supra* note 1, § 63.

358 *Curtis*, 33 Eng. Rep. at 38 (opinion by the Master of the Rolls).

That possibility was not discussed. Why should it matter when Shelley's Rule merges two interests that the language of determination is attached to the clause of the instrument purporting to create a life estate³⁵⁹ rather than the clause purporting to create an inheritable fee interest in remainder? Finding a distinction based on such technicality just adds to the intention-defeating nature of Shelley's Rule³⁶⁰ with no reasonable basis. The North Carolina court in *Ham* should have rejected *Curtis* as wrongly decided.³⁶¹

The extensive 1911 *Note on the Rule in Shelley's Case*,³⁶² citing Fearn, says: "The better conclusion seems to be that the possibility of the freehold's determining in the life of the ancestor who takes it does not keep the subsequent limitation to his heirs from attaching to himself." As noted above, this is true. But it goes on to say the result of this is an "unconditional" (that is, nondefeasible) fee simple or fee tail in the party granted or devised a determinable life estate. This conclusion is worthy of examination because the writer relies neither on *Curtis* nor its American progeny, *Ham*.³⁶³

The Note gives as its sole example a conveyance to A for the life of C, remainder to A's heirs. It is true that C's death before A's determines the life estate in the sense that it could have continued in A

359 Application of Shelley's Rule where the first-granted estate was a fee tail—with remainder to the heirs of the first tenant in tail—rather than a life estate is now moot in this country except in Delaware—the only one of the three states that has not abrogated Shelley's Rule by statute which also has not abolished the fee tail. See DEL. CODE ANN. tit. 25, § 302 (1989); *Springbitt v. Monaghan*, 50 A.2d 612, 613 (Del. 1946) (applying Shelley's Rule to give the life tenant a fee tail where the remainder was to "heirs of the body"). But it was very much a part of the common law when *Curtis* was decided in 1805. See FEARNE, *supra* note 289, at 28. Consider a will with this limitation: to A and the heirs of her body, so long as no alcoholic beverage is sold on the premises, remainder to the heirs of A. Shelley's Rule would merge the remainder with the fee tail to give A a fee simple. Note that here the determination clause is attached to an estate of inheritance, unlike the situation where A is devised a determinable life estate. Would the *Curtis* court have held A got a fee simple absolute rather than determinable by application of *Shelley*? If so, the technicality arising from the facts of *Curtis*—that the determination language was not affixed to the remainder to heirs general—cannot explain the result there.

360 That is, although the conveyor does not intend a fee to vest in the life tenant, at least a fee simple defeasible in the same manner as the life estate was to be less destructive of the conveyor's intent than a fee simple absolute.

361 Decided in 1805, *Curtis* was not part of the common law of England adopted as the state's common law (unless contrary to the "conditions" of North Carolina) in the state's 1778 "reception statute." N.C. GEN. STAT. § 4-1 (1986), enacted by 1778 N.C. Stats. ch. 133.

362 *Note, supra* note 2, at 1005.

363 The only case cited is *Merrel v. Rumsey*, 83 Eng. Rep. 68 (K.B. 1666). *Note, supra* note 2, at 1006 n.88.

until A's death. However, this example is distinguishable from *Curtis*, *Ham*, and *Lydick*, in that applying Shelley's Rule to give to A a fee simple absolute does not destroy an interest in a third party, since the conveyor did not name a special occupant³⁶⁴ to take if A predeceased C. Thus, recognition of a fee simple absolute through application of Shelley's Rule in *pur autre vie* cases is not inconsistent with holding *Curtis*, *Ham*, and *Lydick* to have been wrongly decided and declining to follow them on the question whether, upon applying Shelley's Rule to a determinable life estate, the resulting fee should be defeasible upon the same condition.³⁶⁵

VIII. CONCLUSION

In the dozen or so American jurisdictions where Shelley's Rule must still be grappled with courts should reconsider numerous precedents that have extended an intent-defeating rule beyond its common law scope. While many old cases have been cited in this Article to illustrate several forms of such judicial overkill, the phenomenon is by no means a relic of the past. Indeed, it is central to the result in the most recent reported decision in which Shelley's Rule was applied.

Society National Bank v. Jacobson,³⁶⁶ from Ohio, involved a 1931³⁶⁷ inter vivos trust creating an income interest in favor of a named beneficiary, remainder to the "heirs of his body, or the descendants of such heirs." At the beneficiary's death without bodily issue of his blood, his sole heir was an adopted daughter, who did not qualify as an "heir of the body" under Ohio caselaw in effect in 1931. The corpus of the trust was solely personalty, and one issue was whether Shelley's Rule applied to personalty. The trial court and intermediate appellate

364 See 1 TIFFANY, *supra* note 3, § 60.

365 Compare *McFall v. Kirkpatrick*, 86 N.E. 139 (Ill. 1909), which involved a trust for Eliza Jane for life, remainder to her heirs, or as Eliza Jane should appoint by will or "by an instrument in the nature of a . . . will." As both interests were equitable, Shelley's Rule applied so that Eliza Jane had a fee interest and her heirs nothing. Eliza Jane named a taker of the property after her death in a document that qualified neither as a deed due to lack of delivery nor a will, due to lack of testamentary formalities. It was held, however, that the upgrading via Shelley's Rule of Eliza Jane's interest from a life estate to a fee did not eliminate the power of appointment, and the document she executed was one "in the nature of a will" and hence effective. *Id.* at 141-47. If a power of appointment survives application of Shelley's Rule, should not a condition determining the Shelley-created fee estate in favor of the holder of a possibility of reverter or executory interest?

366 560 N.E.2d 217 (Ohio 1990).

367 Shelley's Rule was made inapplicable in Ohio to inter vivos conveyances by a 1941 statute that the Ohio Supreme Court had held did not apply to pre-enactment conveyances. *Ohio Citizens Bank v. Mills*, 543 N.E.2d 1206 (Ohio 1989).

court held Shelley's Rule inapplicable to personalty. The Ohio Supreme Court conceded that two secondary authorities in the state had so declared and that this was the majority rule in the United States by a large margin.

An 1843 case in Ohio, *King v. Beck*,³⁶⁸ had applied Shelley's Rule to a mixed devise of realty and personalty on the theory that Shelley's Rule had to apply to the realty and that the testator intended his devise to have the same interest in the personalty as in the land. *King*, of course, did not compel the conclusion that in Ohio Shelley's Rule applied to a trust consisting solely of personal property. Thus, the *Jacobson* court's holding that it did³⁶⁹ was an extension of the Rule beyond its common law scope—it applied only to realty—as well as an extension of the “mixed conveyance” rule of *King v. Beck*.

There was yet another reason why Shelley's Rule should not have applied in this recent case. The phrase “heirs of the body” must have meant children, because it is immediately followed by a substitutional gift to “descendants” of such persons should they not survive the life tenant. In its technical sense “heirs of the body” includes such descendants, but the draftsman intended a meaning for “heirs of the body” that did not include them but required spelling out a substitutional gift to such descendants. Thus *Jacobson* was the legal equivalent of a conveyance to A for life then to his heirs but if he leave none to his grandchildren, to which Shelley's Rule does not apply because “heirs” is not used in the technical sense.³⁷⁰

Jacobson may be a unique case in which the court, knowing that because of statutory abolition forty-nine years before it spoke further Shelley's Rule cases were very unlikely to come before it, twisted the Rule to obtain a “just” result that would not discriminate against the life tenant's daughter because she was adopted. None of the scores of other Shelley's Rule cases I read suggested the Rule was being expanded to do “justice,” probably because it is always intent-defeating.

As I have suggested in this Article, I am left with the impression that playing fast and loose with Shelley's Rule by courts is a form of judicial “sport.” The Rule is fun to manipulate. But this is a blood

368 12 Ohio 390 (1843).

369 The Court went on to hold that although Shelley's Rule normally converted a life estate with remainder to the “heirs of the body” of the life tenant into a fee tail, at common law there could be no fee tail in personalty, and an attempt to create such a fee tail resulted in absolute ownership by the life tenant, who apparently had died intestate. Whether the adopted daughter prevailed because the purported life tenant died intestate leaving her as his heir or left a will in her favor does not appear in the *Jacobson* opinion.

370 See *supra* text accompanying notes 304–316.

sport, and the victims are innocent children and grandchildren of a named life tenant who uses *Shelley* to defeat the remainder to his or her "heirs" by an inter vivos or testamentary transfer to others. Like a "fight" in which the matador painfully kills the bull, such "sport" is unacceptable under contemporary views about appropriate conduct, either in the ring or on the bench.